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MR. JUSTICE RAJAGOPALA AYYANGAR'S RETIREMENT.

Mr. Justice Rajagopala Ayyangar has retired after a tenure of just over six years on the Bench. It looks as if it was only the other day that he became a Judge, but the march of time has been relentless and the services of an able Judge will no longer be available to the High Court. When he was raised to the Bench in 1953 it was an obvious choice. No other person in recent time was so richly or so abundantly equipped as he was for the discharge of the duties of his high office. After a bright career at the Law College he was apprenticed to the late Mr. T. R. Venkatarama Sastriar. His close association with leaders like him and Sir Alladi Krishnaswami Aiyar in many noteworthy and important cases brought to him valuable experience and enabled him to acquire proficiency in the different branches of the law. It was also responsible for his interest in and intimate contact with Constitutional Law resulting in his writing an able commentary on the Government of India Act, 1935. He built up a good practice both in Madras and in Delhi and appeared on many occasions both in the Federal Court and later on in the Supreme Court. Thorough grasp of facts, arguments packed with close reasoning, and sober and lucid presentation marked his advocacy. His temperament and character also were such as to fit him for the post of a Judge. He had patience, courtesy and reserve. When therefore he was elevated to the Bench his appointment was widely acclaimed.

Mr. Justice Rajagopala Ayyangar has fully justified the expectations. His judgments make cogent and lucid reading. In *Thangavelu* v. *Commissioner of Police*[1], he pointed out that the running of a brothel is not a use of property guaranteed by the Constitution, nor is it a business the right to carry on which, is guaranteed by Part III of the Constitution; that a license is granted to carry on a business within the law, and where the law is transgressed in the manner of running the business, it is the inherent right of the authority granting the license to cancel it. In *Abdul Ghaffoor Sahib* v. *Election Commissioner*[2] he laid down that an Election Tribunal has no jurisdiction to declare a person who obtained a minority of votes as duly elected, without a finding that the majority of votes, of the returned candidate are invalid. In *C. D. Venkataraman*, In re[3], he declared that the existence of an alternative remedy does not bar jurisdiction under Article 226 and that what counts is its reality, adequacy and effectiveness. The learned Judge was fully alive in his judgments to the need to apply the law with reference to the spirit of the times and the changing facets of life and not in a dull or mechanical way. In *Soundararaja Iyer* v. *Sub-Collector*[4], he observed that in determining whether a restriction imposed on the right to hold and enjoy property by a statute is reasonable, the antecedent history is certainly relevant in considering what society considers proper, and therefore what the legislature could treat as reasonable, and that the economic pattern envisaged by the two five-year

1. (1956) 1 M.L.J. 220.
2. (1956) 2 M.L.J. 284.
3. (1957) 1 M.L.J. 26.
4. (1957) 1 M.L.J. 307.

plans could also be justifiably regarded. In *Abdul Khader* v. *Messrs. Consolidated Coffee Estates Ltd.*,[5] he held that the industrial law has to function on the framework and basis of a social order which in great part rests on the sanctity and enforceability of obligations freely and voluntarily undertaken, that it is wrong to assume that before the Industrial Tribunals the obligations of the employers alone exist and that it is a *tabula rosa* so far as the workmen are concerned, and that the proper approach is to proceed on the basis of contractual obligations relieving the workmen of their strictness where the result achieved would be harsh and one to which the workmen would not have agreed had they been in a position to bargain on equal terms with the employer. The learned Judge's expositions are vivid and marked by realism. In *Mysore Spinning and Manufacturing Co.* v. *Deputy Commercial Tax Officer*[6], he said: "An unconstitutional law has a factual existence but is frozen and is incapable of enforcement by reason of its contravening the Constitution. When, however, the constitutional ban ceases to operate and the fetters, whose existence rendered that law moribund, are removed, the law which therefore was, so to speak, in a state of hibernation springs into activity". In some of his judgments scholarly elucidations on various matters are to be found. Thus *Zamorin of Calicut* v. *Estate Duty Controller*[7] contains a learned analysis of the position of a sthani in Malabar, and *Narayanaswami Naidu* v. *Krishnamurthi*[8], constitutes a highly informative exposition on the development of public corporations and their powers.

Mr. Justice Rajagopala Ayyangar's judicial work has in a large measure been concerned with writ matters, taxation and company law problems, and constitutional questions. In every branch of the law the learned Judge has been equally at home. The worth of a Judge is really measured by the good-will he has been able to gain from the Bar and the satisfaction he has been able to give to its members by the quality of his judicial work and the manner in which he has functioned as a Judge. Judged by such a test, it may, with confidence, be stated that Mr. Justice Rajagopala Ayyangar has done well. He is still vigorous and very alert and can give many more years of valuable service in whatever sphere of work he is called upon to serve. It is to be hoped that his services will be fully availed of and utilised.

SUPREME COURT'S OBSERVATIONS ON S. 162, CRIMINAL PROCEDURE CODE

Need for urgent Amendment

By

N. RAMASWAMI IYENGAR. B.A., B.L. *Advocate, Madurai.*

The Judgment of the Supreme Court in *Tahsildar Singh* v. *State of Uttar Pradesh*[1], has by a majority of four Judges against two held that questions, relating to omissions in the statements recorded during investigations by the Police Officers should not be put in cross-examination under section 162, Criminal Procedure Code and they have given three instances of exception in which by fiction such omissions can be deemed to form part of the recorded statements for which they have added three illustrations. The majority of Judges have definitely ruled out other omissions even if they relate to relevant and vital particulars. On the other hand, the two dissenting Judges have definitely held that "relevant and material omissions amount to vital contradictions which can be established by cross-examination and confronting the witness with his previous statement—we cannot see why a question of the nature of cross-examination regarding an omission with respect to a matter which the witness omitted to make in his previous statement and which if made would have been recorded cannot be made—Not only is it the right of the accused to shake the credit of the witness but it is also the duty of the Court trying an accused to satisfy itself that the

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5. (1958) 1 M.L.J. 11.
6. (1957) 2 M.L.J. 167.
7. (1957) 2 M.L.J. 226.
8. (1958) 1 M.L.J. 367.

1. (1959) S.C.J. 1042 : (1959) M.L.J. (Crl.) 759 : (1959) 2 M.L.J. (S.C.) 201 : (1959) 2 An. W.R. (S.C.) 201.

witnesses are reliable. If the section is construed too narrowly the right it confers will cease to be of any real protection to the accused and the danger of its becoming an impediment to effective cross-examination on behalf of the accused is apparent."

In coming to their conclusion the majority of Judges held that in section 145 of the Evidence Act, clause (2) alone applies with reference to section 162 of Criminal Procedure Code while the dissenting Judges assert that both the clauses of section 145 of the Evidence Act would apply. It is submitted that in actual practice in Madras, questions relating to omissions on vital matters have been normally permitted hitherto and I may also add that the specific question concerned in the present case namely whether the witness had stated before the police about the presence of gaslight at the scene may have been allowed just as the Allahabad High Court had also held in this case. It is evident that the existence of a gaslight is an important piece of evidence to prove the possibility of clear and definite identification by witnesses to the occurrence during night and the investigating officer who is not a mere "machine" or a "dictaphone" should consider the existence of a light as a vital and relevant fact and therefore question the witnesses about how he could identify the assailants and if the witnesses had given an answer it should have been recorded in the statement given by witnesses. The absence of such a statement should necessarily mean that the witnesses did not mention it during investigation and though such an omission cannot come within the meaning of the word contradiction as now decided by the Supreme Court, it has to be recognised that there should be created a legal basis for putting such vital questions in the interests of justice and for benefit of the accused. An amendment by adding another proviso to section 162, Criminal Procedure Code, for permitting questions relating to omissions on relevant and vital matters can alone statisfy the need.

The dissenting Judges while holding that both the clauses of section 145, Evidence Act, would apply and also that omissions relating to vital matters should be permitted, say that in the present case the form in which the questions were put was not correct. They observe that the witness should be told what he had stated to the police and asked to explain the omission in order that what is elicited may be a contradiction. I respectfully submit that there is a danger in certain cases when the witness is told what he has said. In a case where there are two accused charged with having stabbed the deceased each once, and the witness has spoken of A-1 alone to the police and now speaks of A-2 alone, if what he has said to police about A-1 is asked it will be detrimental to A-1 and the witness may add about A-1 also in evidence. What is absolutely necessary for A-2 is only to establish that implication about him is a later development. It is submitted that questions should be permitted to elicit an answer that the witness did not mention about A-2 to the police. The investigating officer has to be questioned whether the witness told him about A-2. If it is a matter of vital importance, the investigating officer has to admit that the witness did not say so as indeed he should say with respect to A-2. It is for the Court to decide as to which is vital and relevant and which not. The contradictions between the statements of the witness and investigating officer should be permitted to be elicited irrespective of whether the evidence of the witness is *ipso facto* a contradiction to what is actually found in the recorded statement. Questions should be permitted to establish a contradiction. The theory of three instances added by way of fiction may, it is submitted, give rise to difference of views in practical application. It cannot be denied that omissions on relevant and vital matters should be permitted for a just decision in the case. The prosecution may also be in a disadvantage under the present judgment by their not being able to avail themselves of the new amendment by putting questions to prosecution witnesses when some of them turn hostile and give answers deliberately to help the defence leading to private defence or even *alibi*.

I wish to state that statements are now being recorded in the first person and as far as practicable in the language of the witness. The investigating officers are taking care to elicit important details and hence there will be no prejudice caused by omissions being elicited.

It is submitted that one cannot question the legality of the judgment and on the facts of this case there cannot be a different finding. The non-admission of the questions has not prejudicially affected the accused in this case but the far-reaching consequences in applying the principles laid down therein in practical conduct of cases have to be considered by the legislature and in view of the emphatic expression of opinion by the two dissenting Judges taken along with what has been the invariable practice all these years, it is submitted that an amendment by way of addition of a proviso to section 162, Criminal Procedure Code, should be added to the effect that omissions on relevant and vital matters shall be permitted to be elicited during cross-examination.

I humbly appeal to the Government and individual members of the Parliament to consider the suggestion and enact the necessary amendment for the purpose of rendering justice. A quick move is necessary since it is a matter of great importance in the trial of all criminal cases every day.

LEGAL PRACTITIONERS BILL, 1959.

Joint Committee's Press Communique.

The Joint Committee on the Legal Practitioners Bill, 1959, met under the Chairmanship of Shri C. R. Pattabhi Raman, M. P., on Friday the 18th December, 1959 and decided that Bar Councils, associations and individuals desirous of submitting memoranda on the Bill for the consideration of the Committee should send 55 copies of each memorandum so as to reach the Secretary, Lok Sabha Secretariat, Parliament House, New Delhi, on or before 15th January, 1960. The Bill was published in Part II, Section 2 of the *Gazette of India*, Extra-ordinary, dated the 19th November, 1959.

The Committee will meet next on January 25, 1960.

SRI K. VEERASWAMI.

Judge-designate of the Madras High Court.

Sri K. Veeraswami, Advocate and Government Pleader, Madras, has been appointed as a permanent Judge of the Madras High Court and he will be assuming charge of his new office in the third week of February, 1960. It is a signal honour conferred on him, in recognition of his merit, of which he and the younger generation of the Bar could feel legitimately proud.

Born in 1914, in a traditional family of agriculturist landowners, he graduated from the American College, Madurai, and passed out of the Law College, Madras, in 1940. He served his apprenticeship under Sri K. Rajah Iyer, a leading member of the Madras Bar, and continued to work as his junior, after enrolment as an Advocate in 1941, till the latter retired as Advocate-General of Madras in the middle of 1950. Towards the close of 1953, he was appointed Assistant Government Pleader, Madras and became Additional Government Pleader in 1957, and in July, 1959, he was appointed Government Pleader, Madras.

Almost from the commencement of his career as a lawyer, Sri Veeraswami had a commendable practice and had all the training and equipment that paved the way to his present appointment. During the years of his work as Assistant Government Pleader and later as Additional Government Pleader he had the unique opportunity of getting thoroughly familiar with almost all the statutes, rules and orders, and of handling a variety of cases, known for their complex facts and intricacies of law. It could truly be said that he has almost grown with the development of the law in several fields, like Constitution, Sales-tax, Motor Transport, Municipal and Local Bodies and several other major and minor statutes. Appearing as he did on behalf of the State in several writ proceedings that marked the immediate post-Constitution period, he has probably handled more cases, both complex and varied, than any other. He could almost repeat from memory the history of many of the recent statutes, how they were shaped or re-shaped in the course of years, and we are sure this hard and great experience will stand him in good stead in his present assignment.

Courteous and polite, almost to a fault, Sri Veeraswami is never known to have been harsh to any one. Soft but firm in his voice his advocacy was incisive and successful. In his conduct of cases on behalf of the State he believed that success is what success does and was never anxious to win a case on technicalities or quibbles. He was fair to the adversary and met all the points in controversy in an atmosphere of understanding and appreciation, which endeared him at once to the Court and to the opposing counsel.

Being of a reserved disposition and devoting his whole time to the study of law, Sri Veeraswami was not seen much in public. Though a member of several clubs and associated with a number of institutions he would not be in the group unless under the compulsion of his friends and associates. When in company he is a good mixer and an entertaining conversationalist.

With his training and study, the wig of a Judge will sit lightly on his head and we join the large number of his friends and well-wishers in offering him our felicitations on the honour and recognition conferred on him, and wish him all success.

LATE SIR LIONEL LEACH.

We learn with deep sorrow that Sir Alfred Henry Lionel Leach, former Chief Justice of the Madras High Court, passed away on 26th January, 1960, at the age of 76.

Members of the Bar and the Bench of the Madras High Court, most of whom would be knowing the late Sir Lionel Leach personally, would feel that they have lost a great personality. During the decade when he was the Chief Justice of Madras he has exhibited his great powers of administrative and judicial abilities and has left impressions of his stewardship of the High Court.

Son of an English Barrister Sir Lionel was called to the Bar in 1907 and practised as a Barrister for over twenty-five years when he was appointed a Judge of the High Court at Rangoon. He came to the Madras High Court as its Chief Justice in 1937, which post he occupied with dignity and efficiency till early 1947. Later he became a member of the Judicial Committee of the Privy Council.

Tall and well built with sharp features, with a voice that commanded respect and a bearing that instilled deference, the late Sir Lionel will be remembered as one of our most impressive Judges. Almost everything about him, his stately deportment, measured steps, steady and resonant voice, full and complacent posture, measured conversation, sharp, and almost stern look made him a Chief Justice every inch as his Lordship Chief Justice Rajamannar pointed out in his reference. The first Court was looked upon as the *sanctum sanctorum* during his period and even eminent lawyers would think not twice but many times before entering his Court unless they were fully prepared and equipped to argue the case. Himself being meticulous in every detail he expected the Bar to be thorough and efficient and keep up to its high traditions both in advocacy and professional conduct.

The reported cases in the volumes of the Law Reports would bear ample testimony of to his Lordship's abilities as a Judge. His judgments were marked by their analysis of thought and clarity of expression. He laid down the principles of law without any ambiguity or scope for controversy in the application of precedents. While hearing arguments his Lordship would wade through and pass all minor aspects of a case and come to the crux of the problem. Like an expert athlete who would lightly pass by smaller hurdles and reserve his energy to get over the final hurdle his Lordship would at every stage settle the 'common ground' before taking the plunge to ransack the controversial issues of facts or law.

His Lordship had great admiration for the Madras Bar and was considerate to the junior members of the Bar who had made a thorough preparation of their briefs and made a sincere effort to argue a case before him. The present generation of the Bar and Bench in Madras would remember him as an able independent and impartial Judge who has done a real service to the Judicial administration of the State in all its aspects.

A reference to his demise was made by Hon'ble Sri P. V. Rajamannar, Chief Justice, sitting with Sri Jagadisan, J., in the First Court on 1st February, 1960, when the Registrar, the Advocate-General and the members of the Bar were present. The Court was adjourned for a short time in memory of the late Chief Justice.

May his soul rest in peace.

THE MADRAS INAMS ASSESSMENT ACT (XL OF 1956).

A Critical Note

By

A.S. KUPPUSWAMI, *Advocate, Tirunelveli.*

There are four major defects in the Act. They deserve examination along with the requisite remedies for the same. The Act is a fiscal Act. It empowers the State Government to levy full assessment on all surviving Inam areas in the State, subject to specific exemptions. Vide *i.e.*, charging section 3 (1) which makes all Inam lands liable to assessment and the definition of the term " Inam land " in section 2 (*d*) of the Act. The defects are as follows :

Firstly:—Sub-clause (*ii*) of the definition of "Inam land" (section 2 (*d*) (enacts that the term does not include "any ryoti land, that is to say, any cultivable land in an estate held by a person other than the landholder". The implications of this exemption deserve examination. In positive terms, it means that in "Estate" inam villages, lands held by landholders as distinguished from ryots' holdings are alone liable to assessment. The State Government has thus to decide, at the outset, in reference to every piece of occupied cultivable land in "Estate" inam villages, whether the land is the landholder-inamdar's private land or ryot's ryoti land. This raises an issue of title. The issue covers a wide field. It covers all the surviving inam villages which are "Estates" as defined in section 2 (*d*) of the Estates Land Act (I of 1908). There are as many as nearly 1580 surviving inam villages in the Madras State. They are the so-called "1936-Inam villages" which lie outside the Estates Land (Abolition and Conversion into Ryotwari) Act (XXVI of 1948). With some exceptions,—they are all of them "Estates " under the Estates Land Act (I of 1908). The determination of any inam area as Estate or otherwise is provided for in the recent Madras Estates (Supplementary) Act (XXX of 1956). Another recent Act (XXIX of 1956) which is an amendment of the Madras Estate Land (Reduction of Rent) Act (XXX of 1947) provides for a final judicial decision of the issue as to whether the lands covered by the statutory rent-fixing orders under the Act (XXX of 1947) are Inamdars' private lands or ryoti lands. These lands, however, cover only a small portion of the cultivable occupied villages in the " Estate " Inam villages. In regard to the remaining lands, the issue as to Inamdar's private lands or ryoti is still open. In the main, it is in serious dispute. A satisfactory solution of the issue is necessary for finding, at the outset, whether the lands in "Estate " village are in law liable to assessment. Does the new Act provide such a solution ?

ISSUE OF PRIVATE OR RYOTI UNDER THE ACT.

Strangely enough, neither the Act nor the statutory Rules under the same make any express provision for any enquiry into or any decision of the above issue. But such a power is necessarily implied in the power to levy assessment under section 3 of the Act. The State Government has jurisdiction under section 3 to levy assessment on Inam lands as defined in the Act. Before exercising this statutory power, the preliminary issue arises as to whether the concerned land is Inam land as defined in the Act. It is settled law that the statutory authority has "an incidental power or jurisdiction to determine" the preliminary issue. See *Srinivasa Ayyangar* v. *Revenue Court, Tanjore*[1]. The preliminary decision is, however, an executive decision for the purpose of the statutory levy of assessment. It can have no final or judicial value to decide the issue of title to the land.

Is the Government's executive decision on the issue of private or ryoti land calculated to render justice ? The answer is in the negative for three reasons.

1. (1957) 2 M.L.J. 369 : I.L.R. (1957) Mad. 1222.

(i) The issue of private land or ryoti land is one of title to the Inam land in question. It is elementary justice that such an issue should be decided only by a competent judicial Tribunal. The doctrine of private land of the Inamdar as against the public or ryoti land of the ryots is an off-shoot or by-product of the Inam tenure. It is the duty of the State as the parent of the Inam tenure, to provide for a public judicial decision on the Inamdar's claim to any portion of the Inam lands as his private lands. This duty is imperative. A judicial and final settlement of rights in reference to the Inamdar's claims to private lands in the Inam village is an act of elementary justice to the ryot. It is a denial of justice on the part of the State Government to levy assessment on the Inam lands on the basis that they are the private lands of the Inamdar, in the absence of final judicial settlement of rights to the land.

(ii) The State Government will in the interests of revenue, be naturally inclined to decide in favour of the view that the land is Inamdar's private land as, in that event alone, the land will be assessable to revenue under the Act. Such a situation is undesirable in the interests of justice. It will be prejudical to the ryots in the ultimate judicial decision of their title to the land as ryoti.

(iii) The substantive law on the above issue is in an unsatisfactory condition. There is a conflict between the statutory law and the case-law on the subject. The statutory law is embodied in Sections 185-A and 185-B, Estates Land Act. The relevant provision is as follows : "*Section* 185-A.—In respect of any land which does not fall under any of the categories referred to in (paras. (i) to (vi)) of sub-clause (*b*) of clause (10) of section 3, the landholder may within three years of the date of commencement of the Madras Estates Land (Third Amendment) Act, 1936, lodge an application for a declaration by a Special Tribunal that the kudiwaram in such land was vested in him on the first day of November, 1933 and that he has retained it ever since. *Section* 185-B (1).—*Any land in respect of which the kudiwaram is declared* under sction 185-A to have vested in the landholder on the first day of November, 1933 and to have been retained by him ever since *shall be ryoti land*". Clauses 2 to 5 of section 185-(B) provide for the compulsory acquisition of a permanent right of occupancy by the tenant of the land on payment of compensation within one year and for the ejectment of the tenant on his failure to pay the compensation within the year. Thus, according to sections 185-A and 185-B of the Estates Land Act, the Inamdar's tenant-cultivated kudiwaram land stands on a completely different category from his private lands as defined in section 3 (10) (*b*) of the Estates Land Act, 1908. But the law as declared by the Madras High Court is quite different. *Periannan* v. *A. S. Amman Kovil*[1]. "The essence of private land is continuous course of conduct on the part of the landholder asserting and acting on the footing that he is the absolute owner thereof and the recognition and acceptance of the tenants that the landholder has absolute right in the land". This rule is held to be applicable to the inam villages which became estates under Madras Act (XVIII of 1936)—vide *State of Madras* v. *Zakina Bivi*[2]. Thus, there is a clear conflict between the statutory law under sections 185-A and 185-B, Estates Land Act and the case-law cited above. Due to the conflict, there is uncertainty and consequential injustice in the law. The conflict has to be resolved by the Legislature. The Legislature, instead of resolving the conflict, perpetuates it and erects a tax structure on the top of the same. The injustice is thus aggravated.

A two-fold remedy is required, (i) The conflict between the statutory law under sections 185-A and 185-B, Estates Land Act and the case-law in *Periannan* v. *A. S. Amman Kovil*[1] should be resolved. The tenant-cultivated kudiwaram land of the Inamdar in the '1936 Inams' should be declared to be ryoti lands subject to suitable compensation, on the broad principles of equity and agrarian social justice. (ii) The Madras Estates Land (Reduction of Rent) Act (XXX of 1947) as amended by Act (XXIX of 1956) should be amended so as to provide for a final and

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1. (1952) 1 M.L.J. 71 : I.L.R. (1952) Mad. 741 (F.B.).
2. (1957) 2 M.L.J. 260 ; I.L.R. (1957) Mad, 19.

NOT TO BE REMOVED
DEPARTMENT OF LAW

conclusive judicial decision of the issue of Inamdar's private land or public or ryoti land in respect of all lands in the "1936 inam" villages.

Secondly.—The Act makes (1) all the lands in Inam villages which are not Estates under the Estates Land Act and (2) all the Minor Inam lands liable to assessment under the Act. These lands fall under two broad categories, *viz.*, (*a*) lands in which the kudiwaram right is vested in the ryots or ryots' kudiwaram lands ; (*b*) lands in which the kudiwaram right is vested in the Inamdar or Inamdar's kudiwaram lands. The inclusion in the Act of ryots' kudiwaram lands in the Inam villages which are not "Estates" under the Estates Land Act (1908) is objectionable for the following reasons :

(i) These lands are similar in character to the ryoti lands in " Estate " villages which are exempted from the Act under sub-clause (ii) of section 2 (*d*). The exemption appears to be based on the principle that the ryoti lands which are already assessed to revenue under the Inam Settlement, (the revenue being assigned to the Inamdar under the Settlement) cannot in justice be assessed again under the Act. This principle is equally applicable to the ryots' kudiwaram lands in non-Estate villages and minor Inams. The inclusion of these lands under the Act is on this view a denial of equality under the law for the concerned ryots. In that event, it is a violation of a Fundamental Right under Article 14 of the Constitution of India and is hence *ultra vires* the Madras Legislature and is therefore void in law.

(ii) The full assessment of the lands under the Act, if valid in law, will involve by necessary implication a cancellation of the prior assessment of the lands under the Inam Settlement. If so the lands will be free from liability for the payment of melwaram to the Inamdar under the Inam Settlement. It could not be the object of the Legislature to unsettle the Inam Settlement, in this manner.

The following remedy is suggested. The Inams Assessment Act (XL of 1956) should be amended so as to exclude the lands in which ryots own kudiwaram interest in non-Estate villages and minor Inams. In that event, the Inamdar's kudiwaram lands will alone be liable to assessment in these areas. As a logical sequence to the above, the law should also provide for a final judicial decision of the issue of title to kudiwaram in these lands as between the Inamdar and the ryots. A cheap and efficient judicial machinery should be created for this purpose, on the principle of Act (XXIX of 1956) mentioned above.

Thirdly, the Proviso to section 3 (i) of the Act exempts service Inams consisting of an assignment of land revenue only. Neither the Act nor the Rules make any provision for any final judicial decision of the issue as to whether the Inam is only of the land-revenue or whether it covers the land also. Such a provision is necessary in the interests of justice. The Act should be duly amended for this purpose.

Fourthly, Explanation I of section 3 (1) of the Act enacts that " the levy of full assessment on any Inam which became an estate by virtue of the Madras Act (XVIII of 1936) shall be in addition to any quit-rent, jodi, kattubadi or other amount of a like-nature, payable to the State Government by the landholder immediately before the commencement of the Act." The levy of full assessment in addition to the pre-existing revenue is obviously unjust. It is a denial of equality before the law, for the concerned Inam landholders as compared with ryotwari landholders. This is opposed to Article 14 of the Constitution of India.

Thus, there are four major defects in the Act, as elaborated above. The requisite amendments for curing the defects are also fully discussed above.

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THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (XXII OF 1959)

A Critical Note

By

P. N. CHANDRASEKAR IYER, M.A., B.L., *Advocate, Tanjore.*

SECTIONS 3 AND 15.—Although the Madras Hindu Religious and Charitable Endowments Act *ex facie* applies to Religious Endowments, the Government have taken power under section 3 of the Act to extend all or any of the provisons of the Act to a Charitable Endowment under two contingencies, namely where on enquiry there is proof of mismanagement, or where the trustees or a majority of them, apply for such extension of their own accord. That section further states, that upon such extension the provisions of the Act shall apply as if the Charitable Endowment were a specific endowment under the Act. But this provision has lost sight of the fact that there are two kinds of specific endowments dealt with in the Act, namely those attached to Maths, and those attached to Temples. The authorities exercising control are different and the rights and duties of trustees are different in respect of the said two categories, since the provisions in the Act relating to Maths, govern also specific endowments attached to them, and the provisions relating to Temples govern specific endowments attached to Temples. Under the Act, the Commissioner is the authority vested with jurisdiction over Maths (and specific endowments attached thereto) and over Temples having an annual income of not less than twenty thousand rupees (and specific endowments attached thereto). But section 15 (2) (*iii*) makes a further complication by stating that the jurisdiction over Charitable Endowments to which the provisions of the Act have been extended shall be exercised by the Area Committee. Thus as a result of reading section 3 and section 15 (2) (*iii*) of the Act, the position of Charitable Endowments (to which the Act has been extended) in the Scheme of the Act is rendered obscure.

SECTIONS 17 AND 113.—The Assistant Commissioner is now made the Secretary of the Area Committee. He is entitled to take part in its deliberations, a privilege normally given only to members of a Committee. He has no right to vote. Nevertheless, as Assistant Commissioner he can wield extraordinary powers. He can, in what in his opnion is an emergency, decide whether the Area Committee has failed in its duty, or whether the Area Committee has failed to discharge a duty. Thereupon he can do, what in his opinion, the Area Committee should have done. Thus the Secretary of a Committee is now sublimated to the status of a supervisory authority over that Committee, whose decision or action cannot be questioned or vetoed by the Committee, nor need be ratified for its validity.

The only condition appears to be that the Assistant Commissioner should not act inconsistent with the provisions of the Act, a phraseology whose meaning is as vague as can be. What action the Area Committee can take in case it disapproves the action by the Assistant Commissioner and what the Commissioner is expected to do on a report from the Assistant Commissioner are all left vague. To say the least, these provisions are not conducive to the smooth administration of the institutions.

SECTION 53.—The power to punish trustees (by way of suspension, fine, dismissal) of institutions not comprised in the Commissioner's list has now been given to the Area Committee. It is apparent that this new provision has been made to make the appointing authority and the dismissing authority the same. But it is submitted that the Area Committee will not come up to the requirements necessary for exercising this new function. The composition of that Committee and its mode of functioning are all against a proper functioning in this regard. The enquiry contemplated is a complicated process. There is the preliminary

enquiry, then the framing of charges, the show cause notice, the reply, the examination of witnesses, the perusal of documentary evidence and then the judgment. The judgment is subject to appeal. There is also the provision for writ. The Area Committee is a non-official honorary body of laymen. Its monthly meeting depends upon a quorum, and at each meeting numerous items on the agenda will have to be gone through. How there can be a climate for an efficient and expeditious enquiry of so complicated a nature with lawyers and examination and cross-examination and recording of evidence are matters for serious consideration.

SECTIONS 45, 47, 53 AND 64.—In respect of temples having an income of over Rs. 20,000 the Commissioner is empowered under *section* 47 to appoint a Board of trustees when there is no hereditary trustee, and if there are hereditary trustee or trustees, the Commissioner can after due enquiry as regards proper management, appoint non-hereditary trustees in addition. This power, it is stated, the Commissioner can exercise even overriding provisions to the contrary in a scheme. The power to fine, suspend or dismiss such trusstees is also vested with the Commissioner under *section* 53 who can exercise that power after inquiry into their management.

This power to enquire into the management of the institution can also be exercised by the Commissioner in another manner namely under section 45 when he takes power to appoint Executive Officers ; and in so appointing the Commissioner can define the powers of the trustees *vis-a-vis* the Executive Officer.

But a scrutiny of section 64 will reveal that the Deputy Commissioner can wield identical powers over identical matters. In the guise of taking action for framing a scheme, he can inquire into the mismanagement of any temple, he can remove trustees, he can appoint new trustees or additional trustees and define the duties and powers of the trustees, and it is clear that the powers can be exercised against all trustees inclusive of those appointed by the Commissioner under section 47.

The exercise of identical powers by the Commissioner and his subordinate authority, the Deputy Commissioner besides overlapping, is full of opportunities for conflicts.

SCOPE AND EFFECT OF SECTION 3.—A problem posed by section 3 of the Madras Hindu Religious Endowments Act of 1951 (now repealed), has not been resolved by the new enactment, Act (XXII of 1959) and in a sense it may even be said, that the problem has been accentuated by the way in which section 3 has been elaborated in the new enactment. The problem relates to the mode of relief that is available to a party whose private property rights are adversely affected by the notification proceedings taken under section 3 of the Act.

It will be seen that the Act *ex facie* is made applicable only to religious institutions, that is public temples and maths ; and a hierarchy of authorities are enumerated for their administration namely Area Committee, Assistant Commissioner, Deputy Commissioner, Commissioner and finally the Government. Among the many kinds of dispute that arise under the Act a common one is whether a property which is claimed by a party as his own property is in fact a religious endowment. The Act provides that such a dispute should be decided in the first instance by the Deputy Commissioner under section 63 (*c*), from whose decision the claimant can appeal to the Commissioner under section 69 (1). Thereafter the dispute comes under the jurisdiction of the Civil Court, for, it is provided that against the decision of the Commissioner, the aggrieved party can file a suit in the " Court " under section 70 (1), " Court " being defined as the City Civil Court or Subordinate Judge's Court or the District Court as the case may be. Against the decision of the " Court" a right of appeal to the High Court is provided under section 70 (2). The Schedule to the Act prescribes a fixed Court-fee of fifty rupees for the suit and for the appeal. Sections 108 and 111 lay down that no suit shall be instituted in any Civil Court to decide the dispute except as provided in the Act, that is, except as laid down in sections 63 (*c*), 69 (1) and 70 as above mentioned.

But when we turn to the provision for extension of the Act to Charitable Endowments, the position becomes obscure. The provisions of the Act, can apply to a Charitable Endowment, only if the Government for reasons stated, decides to extend the Act to it by proceeding under section 3. For proceeding under section 3, there must be firstly a public Charitable Endowment, and then the Government must have reason to believe that it is being mismanaged. Thereupon the Commissioner is authorised to hold an enquiry into its affairs. This enquiry contemplated is a full fledged enquiry involving hearing of parties, production of documents, summoning and examining of witnesses, etc., and the provisions of the Code of Civil Procedure are made applicable to it. The Commissioner submits his findings and recommendation to the Government. The Government then publishes a notification in the Gazette of their intention to extend the Act to the particular charity with the reasons therefor and calls for objections, and finally by a further notification extends to the Charitable Endowment the provisions of the Act.

Now in the case of Charitable Endowments also the same dispute often arises, namely whether a property is the private property of the party or whether it is a public Charitable Endowment. When the Government regards the property as a Charitable Endowment the fact that it has been enjoyed as private property and that its income has been utilised for private purposes, will be taken by the Government as proof of mismanagement of the charity. So naturally the Commissioner and the Government have occasion to decide this dispute in the enquiry mentioned above. The conclusions of the Government are usually set out in a detailed order giving reasons for the findings and the order is also communicated to the party.

The question that arises for consideration is what is the remedy of a person whose private property is notified under section 3 on the footing of its being a Charitable Endowment in the opinion of the Government, and does the Act, provide a remedy within its four corners ? It is submitted that none of the sections indicate the remedy, and that sections 63 (*c*), 69 (1) and 70 which provided the remedy in the case of Religious Endowments cannot be made applicable to the case of Charitable Endowments by virtue of the extension of the Act to them. The reason appears to be obvious. In the case of religious institutions, the Deputy Commissioner derives jurisdiction *eoinstanti* the dispute arises, and so also the Commissioner in appeal. But in the case of Charitable Endowments, the initial jurisdiction over the dispute is taken by the Government. Under a delegated authority the Commissioner makes enquiry and comes to his own decision on the dispute and the Government in turn give their decision. It will be doing less than justice to the Legislature to say that the Legislature intended that the Deputy Commissioner should be empowered to take cognisance of the same dispute under section 63 (*c*); because that mode of interpretation will lead to the absurdity of a subordinate authority like the Deputy Commissioner, sitting in judgment over the conclusions of his superior authorities under the Act namely the Commissioner and the Government. Since sections 63 (*c*) and 69 (1) do not apply, the consequential rights to file suit in the Court, and appeal in the High Court under section 70 are also not available.

In this connection sections 108 and 111 of the Act become important. Section 108 states that " no suit or other legal proceedings in respect of a dispute for deciding which provision is made in this Act, shall be instituted in any Court of law, except under and in conformity with the provisions of this Act". In the light of the conclusion made above, that there is no provision within the Act to decide the dispute in a Court of law, it may be taken that this section does not bar a civil suit in a Court of law under the ordinary common law. The other section 111 is more troublesome. It states that save as otherwise expressly provided in the Act no notification issued, order passed, decision made, proceedings taken....under the provisions of this Act by the Government, the Commissioner....shall be liable to be questioned in a Court of law. The section can be interpreted in two ways at least. One interpretation will be that where within the four corners of the Act a method is indicated to question the enumerated matters in a Court of law, that method should be adopted, and if no such method is indicated, the enumerated matters may be questioned in a Court

of law by the institution of suits under the ordinary common law for vindication of rights. The other mode of interpretation will be to state that if a provision is not expressly made in the Act to call in question in a Court of law any of the matters enumerated, no Court of law can question the same. It is submitted that the former interpretation is the correct one and in consonance with the scheme of the Act. To adopt the latter interpretation would lead to the result of total deprivation of the civil rights of a party to protect his property, guaranteed under the Constitution, and specifically preserved in section 107 of this enactment itself.

Under circumstances, almost similar, arising under another recent enactment, namely the Madras Estates (Land Reduction of Rent) Act (XXX of 1947) their Lordships of the Madras High Court have decided that the aggrieved party has the right to file a suit in the Civil Court, against the Government for a declaration of his private ownership. Vide *Raju Chandra* v. *Madras State*[1]. This Act was made applicable to all estates as defined in the Estates Land Act and gave power to the Government to reduce the rents payable by ryots. A preliminary enquiry by a Special Officer was provided and the reduced rents were to be published in the Gazette to take effect immediately, and then came section 8 of that Act which stated that the validity of any order or proceeding relating to the fixing of the rents, and publication shall not be liable to be questioned in a Court of law. The question that arose for decision was what was the remedy for a person whose property according to him was not an 'estate' but which nevertheless came to be notified by the Government under the Act. Their Lordships observe : " There can be no question that a suit to challenge the validity of the order on the ground that the Act does not apply to the property concerned is maintainable.....Section 8 is no bar. That provision will never apply to a case where there is initial lack of power in the Provincial Government to take any proceeding under the Act". It is submitted that these observations apply with equal force in respect of proceedings taken by the Government under section 3 of Act (XXII of 1959), and this decision can be taken as a definite authority for the position, that a suit to challenge the validity of the order on the ground that Act (XXII of 1959) does not apply to the property concerned is maintainable.

But it is submitted that it is often a poor consolation for an aggrieved party that his common law right of civil suit is preserved. For it is a costly remedy, since the valuation of such a suit at the market value and an *vd valorem* Court-fee thereon according to the Court-fees Act, entail prohibitive expenditure. Further, the intention of the Legislature is apparent, that once the Act is extended to Charitable Endowments the provisions of the Act should apply *pari passu* to both Religious and Charitable Endowments. As already stated when the question posed herein arises in respect of religious institutions, quick and cheap remedy in a Court of law is afforded first for a suit in the " Court" and then for a direct appeal to the High Court on a Court-fee of Rs. 50 in each case ; and it is quite conceivable that the Legislature should have intended the same remedy in a Court of law when the question posed appertains to Charitable Endowments, but overlooked the futility of sections 63 (*c*), 69 (1) and 70 for them. If that be so, an addition of another clause to section 3 providing for a suit against the decision of the Government under section 3 of the Act for a nominal Court-fee would be sufficient to meet the needs of the situation. Such a provision will also have the merit of being consistent with the scheme of the Act, for similar provisions are found in the Act in sections 53 (*b*) and 72 (4) providing for suits in Civil Courts against certain other decisions or notifications of the Government.

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1. (1952) 1 M.L.J. 206.

G. NAGESWARA RAO *Vs.* THE STATE OF ANDHRA PRADEH, (1960) S.C.J. 53 : (1960) 1 M.L.J. (S.C.) 13 : (1960) 1 AN.W.R. (S.C.) 13.

By

C. V. RAMANUJACHARI, *Advocate, Bangalore.*

As a result of the judgment of the Supreme Court published in 1959 S.C.J. 967, the question of the validity of the scheme for the nationalisation of road transport in Krishna District in the Andhra State was taken up for consideration by the then Chief Minister of the said State. He invited objections to the said scheme, gave personal hearings to the parties and thereupon passed orders, approving the scheme, as originally published.

Petitions under Article 226 of the Constitution were, thereafter, filed in the High Court, for quashing the said orders. The said High Court, after due enquiry dismissed the said petitions. Against the said dismissal orders, appeals were filed in the Supreme Court, which dismissed them, as reported in (1960) S.C.J. 53 : (1960) 1 M.L.J. (S.C.) 13 : (1960) 1 An.W.R. (S.C.) 13.

One of the main contentions advanced before the Chief Minister and repeated before the High Court and the Supreme Court was that "the Chief Minister by his acts, such as, initiating the scheme and speeches showed a clear bias, in favour of the undertaking and against the private bus operators and therefore on the principle of natural justice.....he was precluded from deciding the dispute, between the parties". In dealing with the said contention, His Lordship Justice Subba Rao of the Supreme Court, who delivered the judgment on behalf of the Bench has stated at page 59 of the report in (1960) S.C.J. 53, after referring to the extract from the report in *The Hindu*, dated October 25, 1957, thus : " This speech has a direct reference to the nationalisation of bus transport in Krishna district and indicates *a firm determination* on the part of the Chief Minister, not to postpone it, any further ". Again, referring to the extract from the report in the *Indian Express*, dated 13th December, 1957, the said learned Judge has at the same page, observed that " this also indicates the *Chief Minister's determination* to implement the scheme of nationalisation of bus-transport in Krishna District, from a certain date." Again, the same learned Judge has at page 60 made a reference to the extract of a speech of the Chief Minister, which appeared in the *Mail*, dated 1st April, 1958. The said Judge, thereupon, very pertinently observes that " if it had been established that the Chief Minister made the speeches extracted........there would have been *considerable force* in the argument of the learned counsel for the appellants", the said argument evidently being that the Chief Minister was disqualified to hear the petitions, by reason of his bias, in favour of nationalisation.

In respect of the speeches, alleged to have been made by the said Chief Minister, indicating his pre-determined bias in favour of nationalisation, the said Minister in his order on the petitions is reported to have stated that " it is not possible for me to state anything definite, about the *veracity* of the statements, said to have been made by me at different points of time. It is *quite possible* that I might have made many such, on many an occasion."

In the above circumstances, whether the Chief Minister had made the speeches extracted, expressing therein so definitely, in favour of nationalisation, before he heard the petitions, has become very material, in disposing of the controversy. For, if the Chief Minister had so strongly and so definitely expressed himself in favour of nationalisation of bus transport in Krishna District, there would be *considerable force* in the contention of the appellants that the said Chief Minister was disqualified by reason of his bias, from hearing the said petitions.

At this stage, it is well to remember that the truth or otherwise of this question *viz.*, whether the Chief Minister had on different occasions made such speeches and in consequence whether he was disqualified to hear the said petitions, with a free, unbiassed and open mind, was raised before the Chief Minister himself. This question involved the determination among others, of the following point: Whether, *in fact* such speeches were made by the Chief Minister. It is plain that the determination of this question was of primary importance in the case. The order of dismissal passed by the Chief Minister and the Supreme Court was mainly based on the finding that it had not been established that the Chief Minister made the said speeches. This finding of *fact* was, as it were, the basis of the said orders.

At this stage arises the fundamental question whether the Chief Minister himself, with legal propriety, can take upon himself the duty of deciding this question, without violating sacred principles of natural justice. Since this question of the legal propriety of himself hearing and deciding about this essential and basic fact of his having made or not the said speeches, it appears to me to be elementary that the said Minister must be held to be disqualified to decide the point, as his action would be violative of the said principles. In coming to a conclusion on the said disputed question, the Chief Minister's evidence would have been one of the best pieces of evidence; and as such, he ought not to have himself decided the point. Placed as he was in the circumstances detailed above, the Chief Minister would have acted with perfect legal propriety if he had not sat to decide the matter, since he could not have acted, as a Judge in the matter, without violating the above said elementary but sacred principles of natural justice. According to those principles, no one could be a judge in a cause, in which he is interested even to a small extent and justice must not only be done, but must also seem to have been done. According to my understanding of the position, a person who is competent to give evidence about a point in controversy could not act as a Judge to decide the said controversy, without offending the said principles. In a case reported in *State of U. P.* v. *Mahomed Nooh*[1], their Lordships have held that, if the officer conducting the enquiry records his own evidence, the procedure violates the principles of natural justice and is also shocking to sense of justice and fair play. In a case reported in *Cooper* v. *Wilson*[2], Scott., L.J. is reported to have stated that proceedings conducted in violation of principles of natural justice are "so abhorrent to English notions of justice that the *possibility* of it or *even the appearance of such a possibility* is sufficient to deprive the decision of all judicial force and to render it a nullity."

It is unfortunate that the decision in question does not deal with or refer to this aspect of the case. To my mind this point ought to have been dealt with and a valuable guidance given by the Supreme Court, for the benefit of judicial and quasi-judicial bodies that might function in our country.

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1. 1958 S.C.J. 242 : 1958 M.L.J. (Cr.) 197 : A.I.R. 1958 S.C. 86.
2. (1937) 2 All E.R. 726.

Mr. JUSTICE BASHEER AHMED SAYEED.

Retirement from Bench.

The Hon'ble Mr. Justice Basheer Ahmed Sayeed, Judge of the Madras High Court, for over a decade, retired from service on 20th February, 1960, on attaining the age of sixty. No greater tribute could be paid to the qualities of the learned Judge than the unstinted appreciation of the Bar expressed by the Advocate-General and the President of the Advocates' Association, on the eve of his retirement.

During his office, his Lordship has been uniformly kind and good to the members of the Bar. He gave a patient hearing in every case, big or small, and to the arguments of counsel, senior or junior, and was never in haste for disposal of cases. He never cut short the course of arguments. Not weighed down by the technicalities of procedure he took pains to analyse the facts and the evidence in each case to arrive at a just result. While following established principles of law, substantive and procedural, and while recognising the value of precedents, his Lordship disposed of the cases before him with the sole object of rendering justice between party and party and was not anxious to lay down principles or precedents in the abstract. Even at the late stage of Second Appeals, if his Lordship felt that a case required fresh scrutiny he did not shirk from the task of obeying his conscience. The patience and industry that he brought to bear upon the hearing of many Appeals and Second Appeals have been able to bring closer even very divergent views of the opposing sides and has resulted in a just and enduring compromise to the best interests of all the parties concerned, which the parties might have desired themselves but could not put forth due to the technicalities of law.

After a happy association of a decade we will be missing the familiar figure of the learned Judge in the High Court.

Before his elevation to the Bench Mr. Justice Basheer Ahmed Sayeed was a member of the Madras Bar and took an active interest in the public life of Madras. He was a prominent figure in the political, social and educational spheres of activities in the State. He was a member of the Madras Legislature, Council of the Madras Corporation and Syndicates of the Madras and Annamalai Universities. He was and continues to be associated with the Aligarh University. He has been in the Madras Bar Council, Madras Law College Council and the Council of the Indian Institute of Science, Bangalore. Special mention should be made of his great selfless service in the cause of higher education. The New College at Royapettah, Madras, inaugurated in 1951, is the result of his efforts as the Honorary Secretary of the Muslim Educational Association of Southern India. As Chairman of the Southern India Education Trust, he has worked in close association with his wife in founding and fostering the S.I.E.T. College for Women at Madras. A large number of students and parents owe a deep debt of gratitude

to him for this signal service at a time when the existing colleges were unable to meet the rush for admissions and hundreds of students were literally stranded, unable to pursue their college studies.

A large gathering of the members of the Bar and the Officers of the High Court assembled in the Court-hall when Mr. V. K. Thiruvenkatachari, Advocate-General, Madras, bade farewell to the learned Judge on behalf of himself and the Bar on the afternoon of Friday, the 19th February, 1960. The Advocate-General referred to the unfailing kindness and courtesy shown by the Judge to the members of the Bar and the spirit of tolerance and friendliness that prevailed in his Court. He also referred to the several virtues of the learned Judge which were acquired by his varied activities in several fields.

In his reply to the farewell address his Lordship recalled his long association with the Madras Bar and the pleasant memories he had of his relationship with the members of the Bar during his tenure of office as a Judge. He thanked the Bar for its co-operation with him in the discharge of his duties. He paid handsome tributes to the Officers and Staff of the High Court in general and the efficiency of the Bench Clerks and Shorthand Writers in particular.

His Lordship visited the Advocates' Association on Friday the 19th February, where he was welcomed by Sri V. C. Gopalaratnam, President of the Association. The Association hall was filled to capacity and it was a moving sight when his Lordship took leave of the members present, individually.

We wish his Lordship long life and good health to continue his useful services in the cause of the country.

THE HON'BLE MR. JUSTICE V. SUBRAHMANYAM.

After serving as an Additional Judge of the Madras High Court for a period of two years Mr. Justice Subrahmanyam has retired from service on the 1st of March, 1960. His Lordship could look back with pride and satisfaction on his career in the Judicial Service of Madras for over three decades. No one who enters service in the subordinate judiciary could have a greater ambition than to aspire to occupy a seat in the highest judiciary of the State. In his term of service as Additional Judge of the Madras High Court his Lordship has not only achieved this cherished ambition but has proved that the members of the subordinate judiciary in the State are second to none in their ability and calibre. Sri V. C. Gopalaratnam voiced the opinion of the Bar when he said that: " Sri Subrahmanyam had exercised the powers of a Judge of the High Court in a manner which had met with the approval of one and all ".

The Hon'ble Mr. Justice Subrahmanyam entered service as a District Munsif in 1927 from where he rose to the senior cadre in the judicial service. Even before he became a Judge of the High Court he served in Madras City as the Principal City Civil Judge and had become popular and familiar with the members of the Bar. Later he became the Secretary in the Law Department of the Government of Madras and subsequently served as a Member of the Railway Rates Tribunal from 1954 till 1957, when he assumed the office of a Judge of the Madras High Court.

Eloquent tributes were paid, on the eve of his retirement, to the popularity of the Judge by the Advocate-General, Sri V. K. Thiruvenkatachari, and by the President of the Madras Advocates' Association, Sri V. C. Gopalaratnam. The Advocate-General recounted the career of the learned Judge in several fields and said that he has been popular with the Bar right through and always gave patient and willing hearing to the arguments of counsel.

In his reply to the farewell address his Lordship observed that the profession of law was an honourable one and lawyers should eschew pettiness of any kind in thought and action. He said that Courts of Justice were Temples of Justice and the Bench and the Bar owed a great responsibility to the citizens and the State, and they should be equipped both intellectually and spiritually to discharge this great responsibility. His Lordship observed that the confidence that people have in the administration of justice should be kept up and strengthened and that they should try to resolve conflicts in a just and proper manner.

Later his Lordship, accompanied by the Registrar went round the several sections of the High Court and took leave of the officers and members of the staff.

We wish his Lordship a long and happy life and pray to God Almighty to give him good health and strength to continue his services in the cause of the Country and the citizens.

SOME NOTEWORTHY IMPERFECTIONS OF THE CODE OF CRIMINAL PROCEDURE

By

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The writer proposes to discuss through the medium of this note only some of the glaringly deficient, incomplete and imperfect provisions of the Code of Criminal Procedure to which he considers it his solemn duty to invite the attention of the Legislature, the Bench and the Bar, so that simultaneous efforts may be made by all concerned in their own sphere of activity towards improvement being made in the situation as a whole. The scope of this note is of necessity, therefore, restricted in character and nature. The writer has attempted to draw the attention of all concerned only to those deficient provisions of the Code which he himself has found to be such during his practice at the Bar.

1. *Section* 366 (2).—The normal as also the mandatory rule is that the judgment in every trial in any Criminal Court of original jurisdiction is to be pronounced or the substance thereof to be explained, amongst other conditions, in the presence of the accused who must, if in custody, be brought up, or if not in custody, be required by the Court to attend, to hear judgment. There are statutory exceptions to the above rule enshrined in sub-section (2) of section 366, Criminal Procedure Code, namely, that the accused need not attend the Court on such occasion where his personal attendance during the trial has been dispensed with under the provisions of any of the sections 205, 353 and 540-A of the Code, and the sentence imposed upon him is one of fine only or he is acquitted.

In either of the above-mentioned two cases it is permissible for the Court to deliver the judgment in the presence of only the defence counsel.

It is quite pertinent to observe in this connection that there are quite a large number of offences under the Indian Penal Code as also under various local and special laws which are punishable only with fine. There are also offences likewise for which the imposition of fine is an alternative punishment in the discretion of the Court. Secondly, it is a time-honoured rule of law as also of practice that the Court should not make up its mind about the guilt or innocence of the accused before actually delivering the judgment. The Court is enjoined not to give any hint of the idea formed by it about the guilt or innocence of the accused before delivering the judgment. It is, therefore, not quite intelligible as to how an accused person, whose personal attendance during the trial has been dispensed with, is to be benefited by the above-mentioned two exceptions. In case the Court directs him not to be present on the date fixed for delivery of judgment, it will give to all concerned, an un-erring hint that the Court would acquit him or punish him with fine only which will grossly violate the rules governing secrecy of judgment. If the accused, in anticipation of such an eventuality absents himself on the occasion, his anticipations might not prove themselves to be correct and thus expose him to other penalties prescribed under the law.

The language of the section as it stands at present makes it necessary for the Court to make up its mind about the nature of the judgment before its actual delivery and also to give an idea thereof to the accused person, if it is really intended that the accused should get benefit from the exceptions engrafted upon the general rule. An amendment of the section to read in the following form is suggested :

"The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with, under any of the provisions of the Code and the offence for which he is on trial is exclusively punishable with fine only, in which case it may be delivered in the presence of his pleader only."

The suggested amendment would make the provisions of section 366 (2) as wholly practicable without violating in the least any of the canons of law.

2. *Sections* 476, 476-*E*, 195 (1) *and* 559.—Mr. Justice M. C. Desai of the Allahabad High Court has made some observations of wide importance about the scope and nature of these sections in his judgment in "*Ramzani* v. *State*"[1]. The facts of the case are in brief, as follows :—

Ramzani had filed a complaint against one Hukam Chand Lekhpal, for an offence under section 218, Indian Penal Code, which was dismissed by a First Class Magistrate, Shri Lalta Prasad. Hukam Chand, thereupon, applied to Shri Lalta Prasad for starting proceedings under section 476, Criminal Procedure Code, against Ramzani for making a false complaint against him. The Court over which Shri Lalta Prasad presided was abolished and the proceedings were transferred to another First Class Magistrate, Shri Bhoo Dev Gupta, who ordered a complaint to be made against Ramzani for an offence under section 211, Indian Penal Code. Ramzani filed an appeal from that order which was allowed by the Additional Sessions Judge, who set aside the order of Shri Bhoo Dev Gupta, and remanded the case to him for further enquiry. In the meantime, Shri Bhoo Dev Gupta's Court had also ceased to exist and the proceedings were transferred to the Court of another First Class Magistrate, Shri Ram Kumar, who after carrying out the instructions of the learned Additional Sessions Judge passed an order directing a complaint to be made against Ramzani as prayed for by Hukam Chand.

Ramzani challenged the order of Shri Ram Kumar also on the ground that Shri Ram Kumar could not be said to be the successor of Shri Lalta Prasad, to whom the alleged false complaint was made by him. His Lordship has during the course of his judgment made the following observations touching the ground ;

(i) There was nothing whatsoever to indicate that the Court of Shri Bhoo Dev Gupta was the same Court which was presided over by Shri Lalta Prasad previously and by Shri Ram Kumar subsequently. All the three Magistrates were First Class Magistrates presiding over the three Courts of the First Class Magistrates, and had no connection whatsoever with one another. It could not be said that they presided over the same Court merely because they held Court in the same room or merely because they exercised the same territorial jurisdiction.

(ii) Under sections 9, 10, and 13, Criminal Procedure Code, only the Courts of Sessions Judge, the Courts of District Magistrates and the Courts of Sub-

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1. 1960 All. W. R. (H.C.) 22, 26.

Divisional Magistrates are permanent, and in respect of these Courts it is legally possible to speak of one presiding officer being a successor of another. Each of these Courts is created with certain territorial limits and the Court remains the same though the officers presiding over it change from time to time.

(iii) In the case of all the remaining Courts, *i.e.*, the Courts of the Magistrates of each and every class, they are not created independently of the appointment of the Magistrates. Any one of such Courts is created in a certain area through the appointment of a Magistrate of the relative class to exercise jurisdiction over it. Naturally such a Court exists so long as the Magistrate continues to exercise jurisdiction in the area. When he is transferred or otherwise ceases to exercise jurisdiction over the area, the Court automatically ceases to exist. If another Magistrate of the same class is appointed to exercise jurisdiction over the same area, another Court comes into existence.

(iv) Neither section 195 nor section 476 refers to a successor in office, and also that the reference to 'successor in office' in section 559 applies only to permanent Courts detailed in sections 9, 10 and 13 of the Criminal Procedure Code which are permanent Courts, and not at all to the Courts of the Magistrates of any class ; and

(v) The provisions of section 559, sub-section (1) cannot be interpreted to confer power upon the District Magistrate to declare a certain Magistrate to be the successor-in-office of another ; only the power to resolve a doubt about the rights of a Magistrate has been given to the District Magistrate and not that of conferring rights upon a Magistrate."

The above-mentioned propositions of law are of wide importance for all the States in general and for the State of Uttar Pradesh in particular.

It admits of no doubt that there exist in Uttar Pradesh like all the other States, the Courts of Magistrates of the First, Second and Third Class, and the number of such Courts is by no means small or negligible; on the contrary it exceeds that of the Courts of the Sessions Judge, and the District Magistrate and the Sub-Divisional Magistrate, all put together, which are termed by his Lordship to be permanent Courts. I am quite convinced that the number of cases tried and decided by such Magistrates equally exceeds that tried and decided by the three permanent Courts. In the State of Uttar Pradesh we have got Magistrates of the First Class, officially designated as judicial officers as also as Additional Sub-Divisional Magistrates in some districts like my home District of Meerut, who have got territorial jurisdiction over the area of a Sub-Division and who exercise and enjoy, practically speaking, all the powers of the permanent Sub-Divisional Magistrate. The Courts of these judicial officers are liable to be abolished at one place and re-created at another place, to use the phraseology of his Lordship, consequent upon the transfer of the presiding officer and due to a variety of other reasons as well. The logical consequences flowing from the judgment in such an eventuality would, then, be that any one of such officers is empowered under section 476 to hold an enquiry into any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*), which appears to him to have been committed in or in relation to a proceeding in the Court presided over by him, to record a finding to that effect, and to make a complaint thereof, *only during the period he is actually presiding over that particular Court*; if he is transferred to some other place within or outside the District, or he is removed from service, or the Court over which he presides is abolished due to

insufficiency of cases, before actually making a complaint of the offence, there remains no other alternative remedy available either to the complainant or to any other Magistrate exercising the same jurisdiction over the same area to bring the culprit to book. Such a complaint may of course be made under the provisions of section 476-A and section 195, sub-section (3), by the Court to which appeals ordinarily lie from the appealable sentences of such former Court. The chances are that, in the circumstances, quite a large number of culprits would never be brought to book ; it may thus prove itself to be a clog upon the fair administration of justice and hamper the judiciary in performing its legitimate duties in a straight manner. We can reconcile ourselves with the realities of the situation thus created only by imputing to the legislature the intention of creating a safety device or escape for the offender or that of creating a lawless society. The legislature could not have intended that consequence. The judgment of the learned single Judge in the *Case of Ramzani*[1], has surely created an unhappy situation and all the Subordinate Courts within the State of Uttar Pradesh are in duty bound to follow and act in accordance with it, until the same is modified or reversed by a larger bench of that Hon'ble Court or by the Supreme Court.

I, therefore, suggest that amendments to the following effect be made, in section 195, sub-section (2), Criminal Procedure Code, to make the position crystal clear, and unambiguous. The section may be amended to read as follows :

" In clauses (*b*) and (*c*), the term ' Court ' includes a Civil, Revenue or Criminal Court in which the offence is alleged to have been committed and the successor-in-office of the presiding officer of such Court to be determined by the District Judge, the Collector, or the District Magistrate respectively, as the case may be, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877."

It is always to be preferred, at any rate desirable, that the defects in law as discernible from the judgments of the High Court or the Supreme Court should be removed at the earliest opportunity than to continue paying premium upon injustice, thereby perpetuated or inflicted until larger bench of the High Court or the Supreme Court modifies or reverses the former judgment.

3. *Sections* 204 (1-*A*) *and* 244—His Lordship Mr. Justice M. C. Desai, of the Allahabad High Court, has during the course of his judgment delivered in *Shubrati Khan* v. *State*[2] made the following observations touching the object and scope of sections 204 (1-A) and 244 of the Criminal Procedure Code.

(i) Section 204 (1-A) of the Criminal Procedure Code, simply requires that no summons shall be issued against the accused unless a list of the prosecution witnesses has been filed. The provision ceases to be of any applicability or use after a summons has been issued to the accused. It only imposes a condition on the issue of a summons against the accused and once a summons is issued it ceases to be of any relevancy and does not govern the subsequent procedure. It does not lay down that only those witnesses whose names are given in the list can be examined by the prosecution.

(ii) The power of a Magistrate to summon witnesses in summons cases is fully and exhaustively laid down in section 244. It contains no restrictions upon his

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1. 1960 All. W.R. (H.C.) 22.

2. 1960 All. W.R. (H.C.) 43, 44.

power, it does not restrict it to issuing summons against the witnesses whose names are given in the list prepared under section 204 (1-A). The power is wide enough to include issuing summons against other witnesses also. If the Magistrate is bound to examine a witness under section 244 (1), if present, even though his name was not mentioned in the list, it should not be held that he cannot issue a summons against a prosecution witness whose name is not mentioned in the list. The Magistrate cannot refuse to examine a prosecution witness on any ground, even on the ground that his name was not mentioned in the list prepared under section 204 (1-A). The power given by sub-section (2) of section 244 to issue a summons to a witness, also is a wide power, subject to no restrictions. Its exercise is not made dependant upon whether his name was mentioned in the list or not. There is no prohibition against the exercise of the power in respect of a witness whose name was not mentioned in the list.

(iii) The legislature added the provisions of section 204 (1-A), by the Amendment Act of 1955, bud did not choose to make any amendment in section 244. Since the language of section 244 remains the same it must be given the same meaning which it bore before the Amendment Act of 1955. Its meaning cannot change merely because the legislature added section 204 (1-A), which does not deal at all with the power of a Magistrate to issue summonses against prosecution witnesses; if the legislature had intended that summonses should be issued only against the witnesses whose names are given in the list, it would also have made a suitable amendment in section 244 also, and when it did not do so, it must be held that it did not intend to curtail the then existing power of a Magistrate to issue summonses against prosecution witnesses.

The above-mentioned observations made with reference to summons cases apply with equal force in similar circumstances to the trial of warrant cases also. The words "the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution" occurring in section 244 (1) also occur in section 252 (1). The words " the evidence of any remaining witnesses for the prosecution occurring in section 256 (1) refer only to those witnesses whose names have been ascertained under section 252 (2) from the complainant and who have not been examined before the framing of the charge as laid down by the High Court of Allahabad in *Raghubar Sahai* v. *Wali Hussain*[1] and also by the High Courts of Lahore and Nagpur in *Hewan Ram* v. *Emperor*[2], and *Abdul Razake* v. *Haji Hussain Sarwar*[3] respectively.

Should we, then, conclude that the provisions of section 204 (1-A) are merely ornamental and unsubstantial in character and essence ? Has the legislature added the provisions in a perfunctory and aimless manner to be treated only as dead letters by the Court and the prosecution ? To me they do not appear or intended to be so inspite of the fact that the legislature has not expressed their object and intention in an explicit and clear-cut manner. It is a matter of wide experience that some witnesses are more often than not persons who are really not in a position to testify any fact relevant to prove the commission of offence, but they

1. A.I.R. 1937 All. 189.
2. A.I.R. 1945 Lah. 201.
3. A.I.R. 1945 Nag. 286.

are procured and produced to support the case by employing questionable and anti-social methods. The prosecution even withholds the witnesses named previously on the mere expectation of their evidence being inconsistent with the prosecution story or due to the possibility or even probability of their being untrue in some respects, and produces fresh witnesses to bolster up its case. The legislature has added the provisions of section 204 (1-A), clearly with the object of checking and curbing such corrupt and unhealthy practices and tendencies. The object is sought to be achieved by making it imperative upon the prosecution to disclose the names of its witnesses at the first opportunity available other than the first information report, if any, of the alleged offence and to safeguard the accused against subsequent variations or additions. The complaint is made at a time when the memory of its maker is almost fresh and he should be then in a position to name all those persons who according to him have witnessed the commission of the offence or any fact related therewith. Might be, the prosecution may genuinely feel at a later stage the necessity of producing a witness not named previously in order to dispel the light thrown on the case by the defence witnesses or in order to fill in the accidental gaps in the evidence. The Court already possesses under the provisions of section 540 the power in such an eventuality to summon any person as a witness or examine any person in attendance though not named or summoned as a witness if his evidence appears to it essential to the just decision of the case. But it is revolting to common sense and notions of fair dispensation of justice that the prosecution should be entitled as of right to summon or produce a witness whose name has not been mentioned in the list filed under section 204 (1-A) without disclosing adequate reasons, or extenuating circumstances in support thereof. Any estimation and interpretation of the provision contrary to that would render it wholly meaningless and of no practical use whatsoever, so far as the defence is concerned for whose safety and benefit alone the provision has been incorporated.

I, therefore, suggest that the relative provisions may be amended in the following manner :—

(i) In sections 244 (1) and 252 (1), the words "and take all such evidence as may be produced in support of the prosecution" should be changed into "and examine all such witnesses whose names appear in the list filed under section 204 (1-A) as may be produced in support of the prosecution."

(ii) Section 252 (2) as it stands at present be deleted.

(iii) Section 244 (3) and section 252 (2) be newly added and worded as "subject to the provisions of section 540, the prosecution shall not be entitled as of right to examine any witness or to have any witness summoned other than the witnesses named in the list delivered by it to the Court under the provisions of section 204 (1-A)."

(iv) In section 256 (1) between the words "the evidence of any remaining witness for the prosecution" and "shall next be taken" the words "named in the list delivered by it to the Court under the provisions of section 204 (1-A)" be inserted.

Lastly, it is a matter of appreciable experience that the Courts, especially the Magistrates, do not deal with, rather ignore altogether, the points raised, objections made, and the case-law, cited by the party during the course of the judgment against whom they deliver the same. If an attempt is made to raise the same point or objection before the Court of appeal in general and the Court of revision in particular, it is opposed by the Court and the opposite party saying that the same was not raised or made in the Courts below, a plea which cannot be effectively and possibly repelled by the maker in the circumstances prevailing at present. It is true that the presiding officers of some Courts permit the parties to submit their arguments in writing, but this is done more to suit the convenience of the Court itself than in the interest of the parties. The written arguments when so submitted do not at all form part of the case-record; they are destroyed by the Court after preparing the judgment. The rulings of some High Courts in India also support and encourage the Courts in their refusal to admit written arguments. I would for myself strongly plead in the circumstances that there should not be any legal bar operating against the filing of arguments in writing by any of the parties. The plea is wholly rational and equitable. The written arguments of any party would of necessity consist of the points of facts and law, objections against the admissibility of evidence produced by the opposite party and the case-law in support of all its contentions. It would help immensely all the Courts and also the counsel of both the parties in appreciating and rebutting the relative party's case as a whole. It would also then be not possible for any party to claim or deny the factum of any particular point having been raised or not in the Courts below. The acceptance by the legislature of the plea should in brief prove itself advantageous, convenient and useful to all concerned without hampering in the least the Court or increasing in any way its burden or responsibility *vis-a-vis* the case.

The suggested provision may be termed as below :

"Subject to other provisions under the Code any party to the proceedings or the case may, after the defence has closed its evidence, submit its arguments to the Court either verbally or in writing incorporating therein all the points of fact and law, objections, and the case-law which the party desires the Court to take into consideration before arriving at the final conclusion and decision upon the case as a whole."

DIVESTING BY AN ADOPTED SON: A PRESSING PROBLEM FOR THE SUPREME COURT

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The Hindu Adoptions and Maintenance Act (LXXVIII of 1956), provides by section 12, proviso (*c*), that

"the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

It is not certain whether any importance is to be attached to the word "vested". While an estate which passes by succession or transfer *inter vivos* may be said in ninety-nine cases out of a hundred to *vest* in the heir or heiress or transferee, it is far from certain whether joint family property passing into the hands of separated coparceners at a partition, or coming into the hands of a sole surviving coparcener by virtue of the prior deaths of his former coparceners, " vests " in anyone at all. To speak of vesting, or even ownership, except in figurative senses and for specifically limited purposes, in the case of coparceners or holders of joint family property pending the possible recreation of a coparcenary is to misuse language[1]. If this view is correct, an adoption may " divest " joint family property in a very limited number of cases still, notwithstanding the apparent intention of this proviso. Thus if a Hindu adopts to himself (a widow can no longer validly adopt to her deceased husband except for religious purposes) the adoption will still work at Mitakshara law a divesting and revesting (in so far as these words are at all appropriate) of the joint family property out of the hands of the existing coparceners and into the hands of them and their new member. Joint family law to this very small and innocuous extent has been preserved. However, after December 21, 1956, no adoption can divest joint family property which has vested for some reason in one coparcener (other than the adoptive father) or in a stranger, not because of any failure of the word " vest " to cover such property, but because the adoptee's rights commence with his adoption (section 12) and the doctrine of relation back is abolished.

This abolition was greatly welcomed. Instances where innocent people had been deprived of their property merely because a widow had adopted a son to her husband, dead, sometimes, as much as three-quarters of a century previously, provoked a feeling of indignation. As a result numerous cases had attempted to minimise the effects of the doctrine of relation back which had been unequivocally pronounced in Privy Council and Federal Court cases, and the various methods used have been criticised in articles the arguments of which it would be undesirable to repeat, except in summary form, here[2]. The whole law relating to divesting by adopted sons was reviewed by the Supreme Court in the celebrated case of *Shrinivas Krishnarao Kango* v. *Narayan Devji Kango*[3], which served to put an end to divesting

1. *Attorney-General of Ceylon* v. *Ar. Arunachalam Chettiar*, L.R. (1957) A.C. 513, 535 (*See* 60 Bom. L.R. (J.) at 167 : per Lord Simonds, " To say that in such circumstances a coparcener has a ' share ' of the property which passes at his death is in their Lordships' opinion a clear misuse of language. Nor does it help to say that the property is ' vested ' in or ' owned ' by (if ' vest ' and ' own ' are legitimate words to use) the coparceners for the time being rather than by all the members of the undivided family."

2. See (1953) 55 Bom.L.R. (J.), 1ff. ; (1955) 57 Bom.L.R. (J.), 73 ff. ; (1956) 58 Bom.L.R. (J.), 1 ff. ; and (1957) 59 Bom.L.R. (J.), 178-182. See also P. Duraiswami Ayyangar in (1956) 69 L.W. 29-33.

3. 1954 S.C.J. 408 : 57 Bom.L.R. 678 : A.I.R. 1954 S.C. 379 : (1954) 1 M.L.J. 630 (S.C.).

of any collaterals who had succeeded to a propositus-collateral of the adopted son, and were remoter than he in the order of succession, assuming that he was alive and competent to take the estate at the opening of the succession. This simplification of the law operated both in the succession to males and that to females[4]. One intolerable nuisance had been eradicated. But the basic proposition remained and was emphasised. The adopted son, adopted at Hindu law and not under our new " Code ", was entitled to recover the whole property of his adoptive father, whether it be joint family property or separate property, in order that the continuity of the line should be preserved in property as well as in name.

The Supreme Court, in the course of explaining why those previous decisions could not be approved, which had enabled divesting to take place of the estate of a propositus other than the adoptee's male lieal ancestor, showed that the position of a *collateral* provisional heir would be intolerable and unexampled. Provisional heirs and limited heirs were well-known, the divided coparcener,[4-a] the sole surviving coparcener and the widow giving title under the limited estate, were all notorious examples and those who dealt with them otherwise than upon sufficient *bona fide* enquiry, knew that upon action being taken by someone interested in the estate, someone who perhaps might not even be alive at the time of the transfer,[4-b] the estate might be divested without notice or compensation. They often paid, on that account, something less than the normal market value of the property. The collateral heir, inheriting from an absolute owner and to all appearances by an absolute title, was in a different position : alienees from him had no notice of defect in his title, and were not on their guard. Consequently it would be inequitable as well as iniquitous to count that collateral as of the same class as the coparcener, manager, or pre-1956 widow. The words in which this very relevant *ratio* is expressed make it clear, it is submitted, that the Supreme Court were of the opinion that a sole surviving coparcener who has alienated without justifying necessity prior to the adoption of a son by the widow of a predeceased coparcener, and the separated coparceners who alienate without necessity prior to the adoption of a son by the widow of a coparcener who died prior to the partition, are *all alike*, in that they can give only a provisional title, provisional until all widows then capable of adoption had died or lost their power to adopt, and that the adopted son *in both circumstances* could divest transferees of property who had taken for purposes which would not have been binding upon him had he been alive and a coparcener at the relevant moments. Mr. Justice Venkatarama Iyer said in a passage often cited before.[5]

"..... *Anant Bhikappa Patil (Minor)* v. *Shankar Ramchandra Patil*[6], went far beyond what had been previously understood to be the law. It is not in consonance with the principle well-established in Indian jurisprudence that an inheritance could not be in abeyance, and that the relation back of the right of an adopted son is only *quoad* the estate of the adoptive father. Moreover the law as laid down therein leads to results which are highly inconvenient. When an adoption is made by a widow of either a coparcener or a separated member then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior

4. See *Sivagami Achi* v. *Somasundaram Chettiar*, (1956) 1 M.L.J. 441 : A.I.R. 1956 Mad. 323 (F.B.) and *K. Ramakrishnayya* v. *M. Narasayya*, (1956) An.W.R. 1120 ; and the now somewhat out-of-date article in (1955) 8 S.C.J. (J.), 217ff.

4-*a*. It will be observed from the quotation below that his Lordship specifically mentions "widows or coparceners in a joint family". It is submitted that the words are wide enough to include instances of a single coparcener who is the head of a joint family.

4-*b*. *Panchaiti Achara Udasi Nirwani* v. *Surajpal Singh*, A.I.R. 1945 P.C. 1 : (1944) 2 M.L.J. 395 (P.C.) ; *Shivaji Ganpati Muthal* v. *Murlidhar Daji*, (1953) 56 Bom.L.R. 426 (F.B.) ; (1957) 59 Bom. L.R. 1117. The rule is fully accepted in Andhra, (1956) An.W.R. 1067.

5. At p. 642 of the M.L.J. Report, and p. 693 of the Bom.L.R. Report. The Andhra H.C. in A.I.R. 1959 Andh. P. 512 (cited below) cite this passage at p. 515, col. (*b*) and refuse to interpret it correctly at p. 516, col. (*a*).

6. (1943) L.R. 70 I.A. 232 : 46 Bom. L.R. 1 : (1943) 2 M.L.J. 599 : I.L.R. (1944) Bom. 116 (P.C.).

to the date of adoption are binding on him, if they were for purposes binding upon the estate. Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened ......and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations. We must hesitate to subscribe to a view of the law which leads to consequences so inconvenient. The claim of the appellant to divest a vested estate rests on a legal fiction, and legal fictions should no be extended so as to lead to unjust results."

Thus his Lordship shows that the rule as re-established in our leading case rests on three legs : (i) pre *Anant* v. *Shankar* cases[6], which authorised divesting of the property of the male lineal ancestors, such as father or grandfather, (ii) the purpose and design of the institution of adoption amongst Hindus, and (iii) the propriety of allowing an adoptee to divest the property of, *e.g.*, the father from whosoever hands it may be found in, provided that the alienation was not originally for a purpose that would have been binding upon him had he been alive and in the position of a son at the time in question ; and, on the other hand, the impropriety of allowing such divesting, when the property belonged to a person with whom the adoptee could not become a coparcener by virtue of his adoption, a person with whom third parties would naturally deal without enquiring whether his title was limited by the existence or potential existence of concurrent rights in the same property. In the passage quoted it is evident that his Lordship envisaged divesting of the property of the adoptive father, whatever its nature, and in whatever hands it might be found, provided that the purpose of the alienation was not binding on the adopted son.

The question may be raised whether the same was understood to be the case whether (i) the property was " vested " in a sole surviving coparcener, and it had passed from him by (*a*) death or (*b*) alienation *inter vivos*, or (ii) the property was "vested " in several coparceners, who had separated after the adoptive father's death, and divided amongst themselves what would have been the adoptive father's share, and had afterwards either (*a*) died, or (*b*) alienated *inter vivos*.

On principle there should be no difference in these cases, except that, with alienations for value, it is open to the mesne holder to prove that the alienations were made to protect the property itself, to maintain persons whom the adoptee would have been obliged to maintain, to pay the adoptee's father's untainted antecedent debts, and the like. The principle, after all, is clear enough. The adoptee is treated like a posthumous child. A posthumous child can recover his father's share from coparceners who have divided after his father's death, subject to binding alienations ; the meaning of that expression " binding alienations " may escape the unwary, but it should be sufficiently clear from what is said above. In the same way the posthumous son can divest alienees from a sole surviving coparcener, as he could from an heir, such as his own adoptive mother. The property, which appeared to be the property of the holders subject to evident rights of maintainees, etc., was held by a provisional " title ", and no stronger title could be conveyed except for a necessity that would bind the whole family, living and to be born or adopted. The coparceners held provisionally as long as a widow lived who retained the right to create a new coparcener retrospectively by adoption, and the sole surviving coparcener, like

6. (1943) L.R. 70 I.A. 232 : 46 Bom. L.R. 1 : (1943) 2 M.L.J. 599 ; I.L.R. (1944) Bom. 116 (P.C.).

any heir, though hardly by so strong a title, held provisionally in the same circumstances. The logic of this position extends to testamentary dispositions by the sole surviving coparcener; and logic demands that both legacies and sales, mortgages and exchanges, not to speak of gifts, must be upset when a son is adopted by the widow of a predeceased coparcener. That logic has been admitted in several cases[7], and recently in the challenging case of *Potharaju Pardhasaradhi Rao* (*Minor*) v. *Potharaju Srinivasa Sarma*[8]. But anyone who has been following the development of the Hindu law of adoption in Bombay, whence most of the cases came, knows that logic is not respected; and now Andhra, in the last mentioned case, instead of following what appears to have been the intent of the Supreme Court judgment[9], has preferred to follow the Bombay Full Bench in *Ramachandra Hanmant* v. *Balaji Dattu*[10], and to remain content with the very unsteady reasoning of the same Full Bench in *Krishtappa Venkappa* v. *Gopal Shivaji*[11], rather than the *ratio* which lies behind the Bombay case of *Gurupadappa Basappa* v. *Karishiddappa*[12], which the Bombay Full Bench in that last case fully and unreservedly upheld. The result, though it appears rational, is disturbing.

The position as left by the Bombay High Court was that whereas a son adopted by the widow of a predeceased coparcener could re-open a partition and force the other sharers to carry their own alienations which would not have been binding upon him, and to give him a share quite free from such alienations; he could not avail himself of the same right where no partition could be re-opened, by reason of the fact that there had been no partition, the other coparceners having died unseparated and left a sole surviving coparcener, who, instead of dying and leaving the family property to pass by inheritance, had alienated parts or the whole of it *inter vivos*[13].

Even where the property *had* passed from the sole surviving coparcener by inheritance, and had then passed from his heir on the latter's death, the Bombay High Court has held that it cannot be reached by the adopted son[14]; but here the Andhra High Court has very properly declined to observe whether the conclusion was fit to be followed. But the basis of the Andhra decision was that a distinction existed (though not pointed out in the Supreme Court) between property which passes from the sole surviving coparcener by inheritance, on the one hand, and property which he has alienated on the other. All the instances of divesting of the holder who had taken from a sole surviving coparcener related to intestate succession. In fact there were cases in Madras as well as Bombay testifying to the sole surviving coparcener's power of alienating by will in spite of the relation back of the adoption made afterwards by

7. For example, *Udhao* v. *Bhaskar*, I.L.R. (1946) Nag. 425, 427; *Krishtappa Venkappa* v. *Gopal Shivaji*, (1956) 59 B.L.R. 176, 182-3.

8. A.I.R. 1959 Andh. P. 512: (1959) 2 An.W.R. 341. This is the best of the series dealing with this subject. The reference to logic is found at p. 513, col. (*b*): " It is true that if abstract logic is to have its way, it may be difficult to resist the force of this argument.' Observe the effect of the famous citation from *Quinn* v. *Latham*, (1901) A.C. 495, at p. 516, col. (*a*), but notice that that *dictum* expressly refers to "generality of expressions" and not to fundamental principles of law which are to be deduced from the *whole pattern of case-law*, and not from isolated incidents independently and without responsibility for the whole. Thus although every decision is authority only for what it actually decides, the effect of a group of decisions relating to the status and powers of an individual known to law cannot be evaded by claiming that decisions on parallel or connected topics are not to be scrutinised in order to establish what that status or those powers are in a particular disputed context. Extension from the known to the unknown may be sometimes unjustified, but it is proper to establish a fundamental proposition with the aid of collateral authorities and thence to determine whether the unknown rule is or is not necessarily to conform.

9. See n. 5 above. The reason stated is that the learned Judge did not intend to disturb the law as laid down in *Veeranna* (see below) and as understood by himself in a case decided while he was as Judge of the Madras High Court: see n. 46 below.

10. I.L.R. (1955) Bom. 837: 57 Bom. L.R. 491: A.I.R. 1955 Bom. 291 (F.B.).

11. (1956) 59 Bom. L.R. 176 (F.B.).

12. (1953) 56 Bom. L.R. 252: A.I.R. 1954 Bom. 318.

13. See Question and Answer at 59 Bom. L.R. 182-3.

14. See n. 10 above. The case was attacked in (1956) 58 Bom.L.R. (J.) l, but has not unnaturally been followed in *Ganeshrao* v. *Ramchandra*, (1957) 59 Bom.L.R. 1032 and *Jhunkaribahu* v. *Phoolchand*, A.I.R. 1958 M.P. 261.

the predeceased coparcener's widow[15]. And it was clear that Bombay had never permitted a sole surviving coparcener's alienations of any sort to be disturbed. How can a distinction be made between alienation and legacy on the one hand and intestate succession on the other? The property after all is joint family property, and the absence of the adopted son at the time is irrelevant in view of the doctrine of relation back[16]. Logic demands the removal of the alleged distinction, but their Lordships in Andhra candidly say that logic is unsupported by authority. Unfortunately they point out the basis of their own judgment; it is practically identical with the basis of Chagla, C.J.'s judgments in the Full Bench cases referred to above; and it is false and easily recognisable as such. What follows in this paper is an explanation partly of what is false in the reasoning, and partly of how a false proposition came to be embedded in the case-law.

But before we proceed a preliminary question has to be answered. The trouble started with *Veeranna* v. *Sayamma*[17], unfortunately recognised as good law in *Anant* v. *Shankar*. *Veeranna's case* was decided in 1928, and was followed several times since[18], and must have been the deciding case in many disputes regarding adoptions and wills made by the last male holder of joint family property. Is the course of usage affecting perhaps hundreds of titles, stretching over 31 years, sufficiently long to justify our clinging to that case, *even if demonstrably wrongly decided*, under the healthful maxim, *communis error facit jus?* If the Supreme Court were to overrule this case untold harm would be done. Such an event would not be unprecedented and might not be wrong[19]. Separate from this enquiry, however, and on much safer ground, because *voidable* alienations are in question and the law of limitation will prevent over-numerous litigations, is the question whether the other source of the trouble, the false *dictum* in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar*[20], can be overruled (or, more correctly, explained into innocuity), now that it has been an effective stumbling-block to the adopted son for 32 years. Had *Veeranna's case* been correctly decided, and had that *dictum* in the Privy Council been correct, it would still have been open to Parliament to put a stop to litigation brought by sons adopted prior to 1956 if its object was to divest transferees from sole surviving coparceners. The question is whether the Supreme Court (assuming an opportunity to do so) will straighten out the law, and overrule the Bombay and Andhra cases which are in apparent conflict with one of the *rationes* in *Shrinivas' case*; and, if that happens, whether Parliament will step in, to stop these iniquitous, but perfectly legal actions by adopted sons; or whether on the other hand the Supreme Court will uphold the cases in question. But if the latter happens it cannot possibly happen for the same reasons as those upon which the Bombay and Andhra High Courts prefer to rely[21].

This is quite certain. The reasons are patently bad, and cannot stand in face of Privy Council, Federal Court, and High Court decisions on other, but closely adjacent, branches of our subject. It is inconceivable that the Supreme Court should

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15. The whole matter is thoroughly discussed by P. Chandra Reddy, J. (as he then was) in *D. Lakshminarasimham* v. *G. Rajeswari*, A.I.R. 1955 Andh. P. 278: 1955 An.W.R. 344.

16. *Ramchandra Shrinivas Kulkarni* v. *Ramkrishna Krishnarao Kulkarni*, (1951) 54 Bom. L.R. 636 cited below.

17. I.L.R. 52 Mad. 398 : 56 M.L.J. 401 : A.I.R. 1929 Mad. 296.

18. *Udhao* v. *Bhaskar*, cit. sup., and *Narayan Ramakrishna* v. *Padmanabh*, (1949) 52 Bom.L.R. 313; also *Vithalbhai Gokalbhai* v. *Shivabhai*, (1949) 52 Bom. L.R. 301 : A.I.R. 1950 Bom. 289.

19. There is a distinction between a mistaken course of conduct or practice, on the one hand and a series of decisions which rely upon a mistaken appreciation of the law. While the law may take account of a development of usage which it would be oppressive to overturn, and which it may itself recognise and mould, it is quite another matter to refuse to state correctly what the law is merely because it has frequently been misstated previously.

20. (1927) L.R. 54 I.A. 248 : 50 Mad. 508 : 53 M.L.J. 57. A.I.R. 1927 P.C. 139 : 29 Bom.L.R. 969 P.C., at p. 262 of the I.A. rep., pp. 144-145 of the A.I.R. report, and p. 978 of the Bom.L.R. report.

21. It is fair to remark that it is possible for the Supreme Court heartily to disapprove of a rule but to hold that it has been in use for so long that it cannot be overturned upon any theoretical basis. This happened in *Gurunath* v. *Kamalabai*, A.I.R. 1955 S.C. 206 ; 1955 S.C.J. 178 : (1955) 1 M.L.J. (S C.) 91.

hold that the sole surviving coparcener was a full and complete owner of the joint family estate for the purpose of disenabling a future adoptee to claim a share in whatever he may have happened to transfer *inter vivos*, whilst at the same time holding that the property in the hands of a sole surviving coparcener is "joint family property", that on his death it is so to be conceived for the purposes of the Hindu Women's Rights to Property Act, 1937, that his alienations can bind only *his own* natural (legitimate) and or adopted son, and that if property is earned by reason of alienations made between the death of the last coparcener to die and the conception of his natural son or the adoption of *his own* adopted son, the fact of alienation will enable that late-comer to have a birth-right in the entire earnings so made. Nothing can be clearer than that the sole surviving coparcener is *not* the full and complete owner of the property: his fruitless attempt to dispose of it to the prejudice of maintenance rights of female dependants of predeceased coparceners shows that clearly enough[22], and the freedom that the temporary absence of a coparcener gives him is apt to prove illusory. It is perfectly true that he is treated *as if he* were a full owner for certain quite limited propositions, each valid, with inevitable built-in provisions and, reservations and justifications, in its own respective sphere.

In income-tax contexts he, as the assessee for the purposes of the joint family is treated as "owner"[23]. For Estate Duty he is treated as owner[24], and under the Hindu Succession Act, 1956, the tradition is continued of making no distinction whatever between the separate property of a sole surviving coparcener and of the same man in his capacity as an owner of separate and self-acquired property[25]. That tradition has a long and involved history, and it is important to remember that for a long time Madras, and until very recently Travancore and Cochin, held that when the sole surviving coparcener died succession did *not* open to the sole surviving coparcener in respect of the joint family property as if he were the owner, but the females took it jointly[26]. This wholesome rule was eventually abandoned in British India with safety, because the sole surviving coparcener held subject to the rights of the females and others (such as illegitimate sons and concubines, if any), and could not defeat their rights—for they could, if they suspected danger to their interests, apply for a charge to be created over the property in their favour[27]. And how a man can be called full owner of property, over which any number of people may at any time apply for individual charges, passes our comprehension. As we shall see, the correct position has been stated authoritatively often enough. The sole surviving coparcener often looks like a full owner : but he is known not to be such, and any *ratio* which depends upon such a proposition must be false. That this is the *ratio* of *Pardhasaradhi Rao's case* is evident. Chandra Reddy, C.J., said[28] :

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22. *Manilal* v. *Bai Tara*, (1893) I.L.R. 17 Bom. 398 ; *Somasundaram Chetty* v. *Unnamalai Ammal*, (1920) I.L.R. 43 Mad. 800 : 39 M.L.J. 179 ; *Ram Kunwar* v. *Amar Nath*, (1932) I.L.R. 54 All. 472 ; *Malkarjun* v. *Sarubai*, A.I.R. 1943 Bom. 187. The right is postponed to joint family debts, but not, it seems, the personal debts of the sole surviving coparceners.

23. See cases cited at 60 Bom. L.R. (J.), 169, n. 18 and 171 n. 27.

24. " Estate Duty and the Nature of a Mitakshara Coparcener's Interest ", (1958) 60 Bom.L.R. (J.), 161ff.

25. Hindu Succession Act, 1956, Sec. 6 : " an interest in a Mitakshara *coparcenary* property."

26. This forgotten chapter of Hindu legal history deserves more than passing attention. The silence of the Mitakshara is extremely significant, implying that custom eked out the exiguous law which the author was prepared to assert : he was concerned only to protect the widow of a separated, sonless, and unreunited male. *Ramlal Koopoo Ammal* v. *Ammani Rucmani Ammal*, (1887) 5 Trav. L.R. 45 (F.B.) was followed in 15 Trav. L.R. app. 35 and 20 Trav. L.R. 35 ; followed and affirmed in *Nagamma Valliamma* v. *Parvathi Sivakami*, (1936) (1111) 52 Trav. L.R. 214 (F.B.) followed in *Dakshinamoorthy Srouthigal* v. *Narayanan Sastrial*, (1935) 51 Trav. L.R. 150 (mother-manager has rights of alienation like a " manager " of a joint family in British India) ; distinguished in *Thanu Adaviar Subramonia* v. *Marimuthu Mutachi*, (1935) 51 Trav. L.R. 198 explained in *Abdul Sakkur* v. *Kasi Ammal*, (1940) 55 Trav.L.R. 151 ; followed in Cochin in 3 Co.L.R. 125 until this was overruled in *Puthi Ammal* v. *Bagirathi*, 18 Co.L.R. 505 ; overruled by *Muthu Neelamma* v. *Perumal Pillai*, (1953) T.C. 1021 : A.I.R. 1953 T.C. 518 (F.B.).

27. *Ramchandra Gururao* v. *Kamalabai*, (1944) 46 Bom.L.R. 358 ; *Satwati* v. *Kali Shanker*, (1955) 1 All. 523, 526 f., (F.B.) ; *Dattatraya Putto* v. *Tulsabai*, (1943) Bom. 646 : 45 Bom.L.R. 802.

28. A.I.R. 1959 Andh. P. 512, 515, col. (*b*).

" We have already pointed out that the sole surviving coparcener is the absolute owner of the property and it is not correct to describe it as a qualified interest in the property and he has consequently full power to alienate it whether by settlement or by will, there being no fetters on such power."

It is likewise, subject to the superficial thinking induced by the determination to reconcile, by force if necessary, divergent propositions in previous Bombay cases, the *ratio* of *Ramachandra Hanmant*[29], where Chagla, C.J., says :

" When *D* succeeded to the property of *R* there was a potential mother in the family of *R* [the sole surviving coparcener], and therefore it is well-settled. . . . .that *D* inherited this property subject to defeasance, the defeasance coming into operation in the event of the potential mother. . . . . .adopting a son into the family of *R*. But it is equally well-settled that subject to this defeasance *D* had an absolute interest in the property which he inherited. He was the full owner of the property, he could deal with the property as his own and it would be erroneous to suggest that *D* had only a qualified interest in this property. As an absolute owner he could alienate the property and the alienation would be binding upon any son adopted subsequent to the alienation. . . . . ."

The reason why *D* was supposed to take an absolute estate was that it was believed that *R* had an absolute state. In *Krishtappa's case* Shah, J., in referring the question to the Full Bench stated the correct position " If the property of a joint Hindu family alienated for non-justifiable purposes is to be regarded as notionally the property of the family for awarding a share to the adopted son of a coparcener, it is immaterial that it was alienated by a sole surviving coparcener or by the surviving coparceners after they have partitioned the estate"[30] and invited the Full Bench to refuse to follow the law as astated in *Veeranna* v. *Sayamma*[31]. But Chagla, C.J., said:[31-a]

" . . . this Court laid down in the earlier decision *Bhimaji Krishnarao's case* that, when there was a sole surviving coparcener and he made certain alienations and there was an adoption in the family subsequent to the alienations, then the alienations were binding on the adopted son because at the dates of the alienations the coparcener had full right to treat the family property as if it were his own property, and that an adoption which was subsequent to the alienations could not affect the property which was already disposed of by the coparcener as a person who acted as the full owner of the property.. Just as the sole surviving coparcener has every right and authority to dispose of the property as if it was of his absolute ownership. . . ."

And the powerful phrase "binding alienations", " lawful alienations ", which had figured so largely in earlier cases was treated as if it meant "any alienations" . A *dictum* in a Madras case likewise refers to the alienations which an adoptee might avoid[32], and it would be totally nullified if "lawful alienations " meant " any alienations whatever."

In fact there are three sorts of sole surviving coparcener :—

1. The sole surviving coparcener who has no widow of a predeceased coparcener living. He is *not* a full owner, unless he is also.

2. A sole surviving coparcener who has no maintainee living, who is entitled to draw maintenance from the joint family property ; and has not begotten a son, whose live birth might retrospectively create a " birth right" over improperly alinated property transferred after his conception. This man is certainly, *pro tempore*, a full owner.

29. (1955) 57 Bom.L.R. 491 at 496.

30. (1956) 59 Bom.L.R. 176 at 181.

31. (1928) 52 Mad. 398 : 56 M.L.J. 401 : A.I.R. 1929 Mad. 296.

31-*a*. 59 Bom.L.R. 176 at 182.

32. *Raju* v. *Lakshmi Ammal*, (1954) 1 M.L.J. 654, 659 : " he cannot question *to some extent* the prior alienations as in *Veeranna*.".

3. In nine cases out of ten the sole surviving coparcener belongs to neither category, and both widows of predeceased coparceners are alive, and also other persons entitled to protect their rights to maintenance are alive, constituting very real encumbrances on the estate. It is the failure to observe the distinctions amongst these three classes of sole surviving coparcener which are ultimately responsible for the confusion from which we suffer.

I. *The sole suriving coparcener is not (except in highly exceptional cases) a full or absolute owner of the joint family estate and therefore his alienations are questionable*:

In *Umayal Achi* v. *Lakshmi Achi*[33] the Federal Court had to determine *inter alia* whether a sole surviving coparcener's joint family property was his separate property within the meaning of section 3 of the Hindu Women's Rights to Property Act, 1937 or whether it was "an interest in a Hindu joint family property". The possibility that it might be neither, seriously considered in several cases upon a *ratio* which still exerts considerable influence with regard to a separated share in joint family property[34], was rejected. Varadachariar, J., said:[35]

"The (learned Judges) proceeded on the footing that the suit properties had come to *A* as the last surviving member of a Mitakshara joint family, but they held that the suit properties were separate properties of the deceased because he had full disposing power over them. They were of the opinion that the Act, itself was enacted " in order to give a widow and a predeceased son's widow a share in the estate of the deceased over which he had a disposing power." With all respect to the learned Judges we think, in the light of the arguments before us, that the question requires a more detailed examination of the scheme of the Act with due regard to the established rules of Hindu law. In cases governed by the Mitakshara school of Hindu law the expression "separate property" has sometimes been used in a limited sense to denote what is known as self-acquired property. But, judged by the test of power of disposition two other kinds of property held by a Hindu governed by that law, *viz.*, property obtained as his share at a partition and property held by him as a sole surviving coparcener may, in some measure, resemble self-acquired property. There is, however, this difference between them, *viz.*, that in the case of self-acquired property, the owner's power of disposition will continue to remain undiminished throughout his lifetime, unless he chooses voluntarily to throw it into the joint family stock, whereas, in the case of the other two kinds of property, his power of disposition will become qualified and his interest reduced the moment a son is born to him or the widow of a predeceased coparcener takes a boy in adoption. It would not therefore be right to place these three kinds of property on the same footing merely on the ground that *at a particular point of time*, the owner may enjoy unrestricted powers of disposition over them."

The fact that the Andhra High Court, in *Chunduru Seshamma* v. *C. Ramakoteswara Rao*[36] preferred to hold that the property of a separated coparcener was not within section 3 of the Act of 1937 at all (a perfectly plausible view), does not mean that the *ratio* of *Umayal Achi's case* is denied there to have any validity (though appearances would suggest that), and even if such a denial were made it would, of course not be binding upon subsequent Benches of the same High Court[37].

The same family whose affairs were brought before the Federal Court in *Umayal Achi* were involved in litigation with the Ceylon Government, and the question

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33. (1945) F.C.R. 1 : (1945) 1 M.L.J. 108 : A.I.R. 1945 F.C. 25.

34. *Bhaorao* v. *Chandra Bhagabai*, (1949) Nag. 465 : A.I.R. 1949 Nag. 110. See (1957) 59 Bom. L.R. (J.) 81ff, at 84-87. See n. 36 below.

35. A.I.R. 1945 F.C. 25 at 31 : (1945) F.C.R. 1 : (1945) 1 M.L.J. 108.

36. A.I.R. 1958 Andh. P. 280, which has *Trisul* v. *Doman*, A.I.R. 1957 Pat. 441 in support, but *Subramania* v. *Kalyanarama*, (1957) 1 M.L.J. 250 : I.L.R. (1957) Mad. 565 : A.I.R. 1957 Mad. 456 and *Jana Gadi Teli* v. *Parvati Santosh*, (1957) 60 Bom.L.R. 553 against it.

37. The F.C. case, being concerned with the status of a sole surviving coparcener, is naturally followed in Andhra, and its *ratio* cannot be denied there until the matter is reviewed once again by the Supreme Court.

of the sole surviving coparcener's " tenure " or "ownership" was closely considered by the Privy Council in *Attorney-General of Ceylon* v. *Arunachalam Chettiar*[38]. Lord Simonds said, in answer to the question whether the property were "joint property of a Hindu undivided family " within the Ceylon Statute [39].

" The nature of the interest of a single surviving coparcener was the subject of exhaustive evidence by expert witnesses and their Lordships were referred to and studied numerous authorities in which in reference to his interest language was used not incompatible with his being regarded as the " ownee " of the family property. But though it may be correct to speak of him as the "owner", yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumed a different quality : it is such, too, that female members of the family (whose numbers may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen, J.: "To my mind it would make a mockery of the undivided family system if this temporary reduction of the coparcenary unit to a single individual were to convert what was previously joint property belonging to an undivided family into the separate property of the surviving coparcener"......[it was not reasonable to suggest a discrimination between property in the hands of a single coparcener and that in the hands of two or more coparceners]. It was urged that already the difference is there since a single coparcener can alienate the property in a manner not open to one of several coparceners. The extent to which he can alienate so as to bind a subsequently adopted son was a matter of much debate. But it appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable ; that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it, that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener "owner", he then attributed to his ownership such a congeries of rights that the property could no longer be called " joint family property ". The family a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word "owner" in this connection. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as " joint property " of the undivided family."

Finally, though it is notorious that a son conceived after an alienation by his father, the sole surviving coparcener, and a son adopted by a sole surviving coparcener cannot question any acts or transfers made prior to the commencement of his "birthright ", it is equally well known that property acquired by the sole surviving coparcener by means of alienations of joint family property made during that period are not his separate property, and cannot be improperly alienated after the conception or adoption, as the case may be, because, although they seem to be accretions in the way of absolute ownership to property allegedly held in absolute ownership, they are in fact earnings by reason of detriment to the ancestral estate, and are in the sole surviving coparcener's hands joint family property in potentiality even at the time when no other coparcener was alive in fact or in law. This is expounded in the extraordinarily useful case of *Sivaramakrishnan* v. *Kaveri Ammal*[40], where the previous case-law was exhaustively reviewed. There in fact the detriment to the ancestral property had ceased, or rather been made good, before the conception of the son, and on that account the earnings were held the sole surviving coparcener's separate property;

38. L.R. (1957) A.C. 513.
39. L.R. (1957) A.C. at 542 : 60 Bom.L.R. (J.) at 171.
40. A.I.R. 1955 Mad. 705 : (1956) 1 M.L.J. 152 : I.L.R. (1956) Mad. 649.

but it is evident that if the mortgage in question had been paid off after the conception the whole earnings made previous to the conception by its aid would have been partible, and alienable only as joint family property. The ownership of the sole surviving coparcener is therefore a very qualified affair, and he is certainly not a full, complete, or absolute owner of the joint family property—a proposition which, stated in such terms, is now seen to be self-contradictory. The Madras High Court quote with approval the words of Wasoodew, J., in *Ayyangouda Basangouda* v. *Gadigeppagouda*[41] to the effect that an adoptee might have a share in the property acquired by a sole surviving coparcener out of the proceeds of sale of the joint family property: "I do not think the position of the sole surviving coparcener, who has invested the ancestral funds in a fresh business started by him, should be different (from the manager of a joint Hindu family's position) merely because he was the sole owner of the entire property at the time of the investment...." But their Lordships emphasise that the sole surviving coparcener is at perfect liberty to alienate joint family property right up to the moment of the acquisition of the "birth-right", because in that interval no coparcener exists having a right to complain[42]. The rights of maintainees to dispute alienations were not mentioned (though they are well known, and it was tacitly assumed that all readers would recognise the holders of this " birth-right " as the alienor's *own* descendants, no question of relation back having been aired in that case.

II. *How did it come to be believed that the sole surviving coparcener was a full and absolute owner of the joint family property?*

It is at this stage that we wonder whether *communis error* saves the wrong cases, and whether on that ground a distinction ought to be made between legacies and other transfers from the sole surviving coparcener. But even here the position is not clear, since there exists authority against the mass of cases which assert the anomalous proposition that the adoption, relating back, takes effect *after* the will has had time to operate[43].

The sources of error were; (i) the failure to observe the difference between the rights of a son adopted to the *propositus*, the sole surviving coparcener himself, and those of a son adopted to a predeceased coparcener, the last being a son whose rights relate back to a time prior to the commencement of the sole survivorship ; (ii) a general failure to recognise the doctrine of relation back at its full value; and (iii) an over-generalisation from the situation of a sole surviving coparcener who *is* in fact an "owner ", because no other rights in those special cases (class 3 above) do or can inhere in the former joint family property which is in his hands. It is unnecessary to expatiate here on the defects of the twin sources of the current legal authority, *Veeranna's case* and *Krishnamurthi's case*, since this has been done so often elsewhere[44]. A summary will suffice.

As their Lordships of the Andhra High Court admit[45], it is *Krishnamurthi's case* which prevents the logical rule from being declared. Just as the Supreme Court in *Shrinivas's case* cut off that part of *Anant* v. *Shankar* which was not based upon authority so it can in respect of *Krishnamurthi's case* undo the harm which was done by a *dictum* expressly stated upon principle and without authority, and having no connection whatever with the subject-matter of the appeal. There their Lordships were concerned with the effect of an ante-adoption agreement entered into by the sole surviving coparcener who adopted to himself. Lord Dunedin said :[46]

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41. A.I.R. 1940 Bom. 200.

42. A.I.R. 1955 Mad. 705 at 713 : (1956) 1 M.L.J. 152 : I.L.R. (1956) Mad. 649.

43. For examples of such cases see above, n. 15, and text to n. 54 below.

44. 55 Bom.L.R. (J.) 3, 58 Bom.L.R. (J.) 10.

45. A.I.R. 1959 Andh. P. 512 at 514, col. (*b*) : (1959) 2 An.W.R. 341: "So far as I can see " (says Chief Justice P. Chandra Reddy) " there is no legal principle on which an absolute estate created by the husband's will in favour of his widow or any one else can be divested by a subsequent adoption, unless we can treat the adoption as so relating back to the life-time of the husband as to destroy in respect of ancestral property his power of disposition by will, a view which the opinion expressed by the Privy Council in *Krishnamurthi Ayyar's case* precludes us from taking."

46. See n. 20 above.

"When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place". The latter part of this is sheer nonsense, but was perforce followed in India by Courts only too glad to pronounce, under the authority of this, somewhat characteristic, excess of zeal to propound the Hindu law which is evidenced elsewhere in his Lordships judgments[47], a rule which was equitable and convenient, even if it was inconsistent with the doctrine of relation back which the Privy Council expounded in the score or so of years following upon *Krishnamuthi's case*[47-a], *Veeranna* v. *Sayamma*[48], was the first of the examples, a case which was so plainly an authority for the proposition contended for in our Andhra case that it is perfectly understandable that their Lordships of Andhra High Court should have felt themselves bound to follow it.

In *Veeranna's case*[48] we are told, " It seems to me (Odgers, J.) that a sole surviving coparcener has always been regarded as the owner of the coparcenary property. The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father....What authority there is with regard to alienations by a male holder are strongly, and it seems to me conclusively against the contention argued by the appellant." But in fact those authorities were worthless in view of the fact that, as we see well enough now, the sole surviving coparcener had many privileges but was *not* the full owner, and in order to obtain the property to which he had acquired a " birth-right " by his adoption the adopted son had a right to recall non-justifiable alienations made by the sole coparcener in the interval after his adoptive father's death. Otherwise the whole point of the adoption would be lost. Knowing that the widow was about to adopt, the sole coparcener could give the property away to his sister, for example, and then say, "what a pity ! The Hindu law never believes a line to be extinct so long as there is a widow alive competent to adopt. And indeed our coparcenary has been kept alive in possibility just for your sake. But what a shame you were not adopted a little earlier ! Your " birth-right" and the inheritance of your male ancestors' line happens to have been alienated, and all alienations of whatever sort are binding upon you, for "lawful alienations " means nothing more nor less than any alienation I care to make. And if that does not teach your revered mother not to interfere with my affairs, nothing will ! "

Veeranna v. *Sayamma*[48] and the wretched *dictum* in *Krishnamurthi's case* were followed in the other cases which the Andhra and Bombay Judges felt obliged to rely upon, and this fact accounts for Venkatarama Ayyar's judgment in *Lalithakumari* v. *Rajah of Vizianagaram*[49], the *dictum* in which, distinguishing inheritance from transfer *inter vivos*, cannot otherwise be explained, and is not unnaturally cited[50] in order to weaken the effect of what the same Judge said in the Supreme Court. However, despite the weight of authority resting upon these two feeble foundations, the true view of the

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47. For an interesting example of how the Indian Courts have treated a similarly incautious *dictum* of Lord Dunedin see A.I.R. 1955 (Journal) 10 ff. Since that article was written numerous examples of reluctance to treat him seriously have come to hand, *e.g.* A.I.R. 1927 Oudh 138 ; A.I.R. 1928 Pat. 220 ; A.I.R. 1934 Lah. 270 ; A.I.R. 1946 Oudh 38 ; A.I.R. 1949 Bom. 80 ; and particularly the instructive *Gunderao* v. *Venkamma,* A.I.R. 1955 Hyd. 3 (F.B.) (where the minority were right, and the rule was overruled in *M. Satyanarayana* v. *J. Veerraju,* (1958) 2 An.W.R. 497: A.I.R. 1959 Andh. P. 79 (F.B.); *Sampat Magho* v. *Surajmal,* (1957) 59 Bom.L.R. 1112; *Sitaram Narayan* v. *Ganpati Appaji,* A.I.R. 1956 Bom. 140. The delicacy with which Andhra and Bombay now handle the incorrect and unnecessary words of Lord Dunedin is only matched by the skill with which the Supreme Court itself limited the application of the *dictum* in *Mst. Kirpal Kuar* v. *Bachan Singh,* (1957) S.C.J. 438.

47-*a*. L.R. 54 I.A. 248.

48. I.L.R. 52 Mad. 398 : 56 M.L.J. 401 at 414-5.

49. A.I.R. 1954 Mad. 19, 40.

50. A.I.R. 1959 Andh. P. 512 at 515, col. (*a*) and 516 col. (*a*).

law, contended for in so many actions and defeated on almost every front, is not unrepresented. These data, lonely as they are, take upon themselves a new value when viewed in the light of the general proposition, which can hardly be doubted in view of other features of the sole surviving coparcener's situation, that this individual is not a sole owner of the estate.

One should turn first to the Privy Council's words in the old case of *Nagalutchmee* v. *Gopoo*[51], their Lordships were evidently sympathetic to the correct view point, and leave the question of the testamentary capacity of the sole surviving coparcener open. The Pundits, whose replies were being considered, definitely stated the law as, it is submitted, it always has been, and the Privy Council in no way contradicted them.[52] Then in *Gurupadappa's case* Bavdekar, J., evinced strong sympathy with the correct view, notwithstanding the *dictum* of Lord Dunedin, and if he had not felt that, like all Privy Council *dicta*, it was *prima facie* binding upon him, he would certainly have ignored it[53]. The possibility that a legatee may be divested by the adopted son, where the testator was a sole surviving coparcener has been asserted *Krishnamurthi* or no *Krishnamurthi*, in a Bombay case the peculiarity of the facts in which may have enabled the value of the decision to be passed over it is, it is submitted, no mere shadow of the rule in *Gurupadappa's case*. In *Ramachandra Srinivas Kulkarni* v. *Ramakrishna Krishnarao Kulkarni*[54] there had been a coparcenary consisting of *S* (the father) and *R* and *K* his two sons. *K* died in 1930 leaving *W*, his widow. Hearing that *W* was proposing to adopt, *S* and *R* decided to separate, and the separation of status took place on December 9, 1932. *S* thereupon, prior to any partition by metes and bounds, became a sole coparcener in respect of one half of the coparcenary property. Until 1930 his interest had been a presumptive third, but by *K*'s death *S* and *R* had survived to the deceased's third, with the result that by the successive operation of survivorship and severance of status *S* became, to all appearances sole owner and full master of one half of the family property. It will be recollected that the Act of 1937 had not then been passed. On 16th December, 1932, *W* adopted the plaintiff. On the same day *S* and *R* registered the deed of partition and *S* gave his share away to *R's* children partly by deed of gift and partly by will. After *S's* death, and the will had become apparently operative, the plaintiff sued for a half share in all the family properties, including those given away and bequeathed by *S*. He was successful. It is perfectly true that in this case the testamentary disposition took place and purported to take effect *after* the plaintiff was adopted, but it is to be observed that the plaintiff's rights did not stem from the *time* of his adoption, but from the fact that, whenever adopted his rights related back to the moment of *K's* death. As their Lordships very properly say[55]......."

" it is held that every adoption made by a Hindu widow relates back to the death of the adoptive father; therefore, it can be no valid answer to the claim made by the adopted son that the coparcenary which he seeks to enter by reason of his adoption had already ceased to exist ."

Thus, where a coparcenary has ceased to exist, whether by the deaths of former coparceners, or by a partition of the survivors from amongst them, the adopted son of a predeceased coparcener ought to be able to demand a partition of the family pro-

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51. (1856) 6 M.I.A. 309. In that case it was found as a fact that authority to adopt had not been given, but had it been given, and had the adoption been made in pursuance of it it is clear that the Will would have been held invalid. See headnote and the *dictum* at p. 345 refusing to lay down that a man who has no son at the time can bequeath as freely as he can transfer *inter vivos*.

52. The pundits' answer on p. 320 should be understood in this sense. In or about the years 1846-8 it was generally understood by the pundits and thus by the Company's Courts that a man might make a Will disposing of the family estate only when he had no male issue and subject to adequate provision for all dependants of the family. The proposition that a coparcener cannot make a Will of his coparcenary interest appeared later, but was another way of expressing part of the same proposition.

53. See (1953) 56 Bom. L.R. 253 at 255-6.

54. (1951) 54 Bom.L.R. 636.

55. At p. 641.

perty, and call the surviving holders of the property to account for the ways in which they have alienated it.

Conclusion.—These cases of adoptions before 1956, motivated often by a desire on the adoptive mother's part to cause distress to her deceased husband's collaterals, are of frequent occurrence. The Supreme Court may have to make up its mind whether to straighten out the law, or justify the anomaly entirely upon the maxim *stare decisis*[56], or perhaps, *communis error* (though this latter is doubtful). This very worrying problem, with which the Andhra High Court could grapple effectively only upon the assumption that it was bound by the Privy Council *dictum* above cited, and by the Indian cases which gladly followed it, cannot be disposed of by the Supreme Court in the same fashion. At the risk of repeating what was said earlier it may be submitted that, whereas the law relating to reopening partitions is well-established and requires no adjustment and the law relating to intestate succession from a sole surviving coparcener is likewise comfortably settled, an overhaul of the position with reference to alienations by a sole surviving coparcener would not be very objectionable, since the law of limitation of actions will serve to protect a great many transferees; (for only pre 1956 adoptions are in point and bringing the whole chapter of law into harmony (despite the repeated citation of *Quinn* v. *Latham*[57] in the existing cases) would be a worthy effort in itself, and no catastrophy, as chains of title will be not endlessly be disturbed as was the case with the decision in *Anant* v. *Shankar*[58]. If only Parliament would step in and cut the knot, much expense and anxiety would be saved.

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56. In *Maktul* v. *Manbhai*, (1958) S.C.J. 1268 : A.I.R. 1958 S.C. 918 a rule laid down by a Full Bench had been regarded as controversial, and although not overruled by the Privy Council had been impaired by *dicta* there. When it was pressed upon the Supreme Court that *stare decisis* should protect the rule, that tribunal held otherwise, and cited authorities in England and the United States showing the limits to be placed to *stare decisis*. The Supreme Appellate Court will not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside. . . . . . the common law. Halsbury suggests (19 *Hals. L. of E.*, 2nd ed., sec. 557) that this eventuality is not to be contemplated where titles will be disturbed and persons can complain but the American authorities (*Corp. Jur. Sec.* pages 302, 322) suggest a wider discretion ; and it is certain that both the Supreme Court and the Privy Council before it overruled decisions in Hindu law in circumstances where titles would readily be disturbed and complaint from some quarters was inevitable. For example one may take *Anant* v. *Shankar* itself and *Annagouda* v. *Court of Wards*, (1952) S.C.J. 20 : (1952) 1 M.L.J. 414 (S.C.), *Arunachala Mudaliar* v. *Muruganatha*, (1953) S.C.J. 707 : (1953) 2 M.L.J. 796 : A.I.R. 1953 S.C. 495.

57. L.R. (1901) A.C. 495 at 506 cited, *e.g.*, 57 Bom. L.R. 491 (F.B.) at p. 498, and A.I.R. 1959 Andh. P. 512 at 516, col. (a) See note 8 above.

58. L.R. 70 I.A. 232 : (1943) 2 M.L.J. 599.

THE MADRAS IRRIGATION (BETTERMENT CONTRIBUTION) ACT (III OF 1955).

By

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The Madras Irrigation (Betterment Contribution) Act is a fiscal Act. Its provisions relating to assessment raise an important question of constitutional validity.

Section 3 is the charging section. It enacts that the State Government shall be entitled to levy a Betterment Contribution in accordance with the provisions of the Act from the landholder of any land which in their opinion is benefited by any Irrigation or Drainage work, the cost of which exceeds Rs. 25,000. Section 4 of the Act, along with the concerned statutory rules under the Act deal with the assessment of the lands. The assessment involves two processes,

Firstly, the taxable lands in each village are classified and the lands under each class are delimited. The proviso to section 4 (1) of the Act directs that lands of the same taram or quality and of equal command of benefit from the work are to be placed in the same class. Under rule 9 of the statutory rules, the lands of the same class are to pay the same rate of contribution per acre. This power of classification has been delegated under rule 13 to the "Betterment Levy Officer." He is the officer authorised by the Government to determine or assess the contribution payable by individual landholders under section 4 of the Act. Thus, the preliminary process of the division of the lands into suitable classes bearing the same rate of contribution per acre is carried out by the Betterment Levy Officer.

Secondly, the Betterment Levy Officer tentatively fixes the rates of contribution per acre for each class of lands on the statutory basis described in the Act and the statutory rules. The contribution is assessed as one-half of the difference between the increase in the capital value of the land and the landholder's cost of improving the land to make it fit for the Betterment Irrigation under the work. The capital value is computed as ten times the estimated annual increase in the gross produce. The contribution, thus assessed, is payable in twenty annual instalments. The tentative rates, thus determined, are published by a notice in the village chavadi or any other public place in the villages. The fact of publication is announced by tom-tom in the village. The Village Officers have to furnish a certificate of the publication attested at least by two witnesses who are landholders affected by the levy. The affected landholders may send their objections to the officer's proposals or any suggestions relating to them to the officers in writing within fifteen days of the publication of the notice. The officer will consider the objections and suggestions and give his decision on the same. The decision is subject to an appeal to the Collector of the District or the Board of Revenue as the case may be. Subject to the right of appeal, the officer's decision is final and binding on all persons having interest in the lands and is not liable to be questioned in a Court of Law. The rules confer a power of revision on the Board of Revenue as well as the Government. This, in a broad outline, is the substance of section 4 and rules 10 to 17.

It is clear from the above that in regard to the preliminary process of delimitation of the lands into suitable classes, there is absolutely no provision for any manner of notice or opportunity for hearing for the affected landholder. In regard to the second stage of the determination of the rate of contribution for each class of lands by the Betterment Levy Officer, the only opportunity for hearing that is given to the affected landholder is the publication of the tentative proposals in the village chavadi or other public place in the village. There is no provision for the service of any individual notice on the assessee. Is this procedure legal ?

The relevant law is stated in the following terms in *V. H. Syed Mahomed & Co.* v. *State of Madras*[1] in a case under the Madras General Sales Tax Act (IX of 1939). "The general rule is that due process requires that the tax-payer be accorded an opportunity to be heard at some stage in the proceedings before his liability is irrevocably fixed with respect to all matters, the ascertainment of which involves the exercise of such administrative or quasi-judicial functions, so far as those matters affect the existence or extent of his liability ". "Where the assessees were duly served with notice under the Act and had ample opportunity of putting forward before the Tribunals all contentions based on the provisions of the Act or the Rules thereunder, but did not avail themselves of it, they cannot be permitted to put forward in a writ petition questioning the validity of the Act or rules the contentions which were available to them before the Tribunals ". "A tax-payer who fails to take advantage of the opportunity to be heard accorded to him, loses his right to object to an assessment made against him". As observed in *Hazari Lal* v. *I. T. Officer, Ambala*[2], "assessment is a quasi-judicial function " and "it is the official determination of liability of a person to pay a particular tax ".

1. (1952) 2 M.L.J. 598. 2. 58 Punj. L.R. 499.

Applying the above legal test, the result is as follows :—Neither the Act III of 1955 nor the statutory rules provide any manner of notice to the concerned landholder at the preliminary stage of delimitation of the taxed lands into suitable classes bearing the same rate of contribution. In regard to the second stage of the process of assessment, the only provision for notice to the assessee is the provision for publication in the village chavadi or other public place. This is inadequate in two respects : (1) A publication of this nature cannot reasonably be expected to reach every landholder. (2) There is no provision for any oral hearing. The Betterment Levy Officer has to find a uniform rate of contribution for all the lands under each class after considering the several individual objections and suggestions from the concerned landholders. A proper procedure for hearing for such a purpose will be a joint hearing for all the objections and suggestions relating to each class of lands. The relevant law is contained in the following classical passage in the judgment of Viscount Haldane, L.C. in (*Local Gov.rnment Board* v. *Alridge*[1]). " When the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must give to each of the parties the opportunity of adequately presenting the case made ". A joint oral hearing of the objections and suggestions will alone give the objectors an adequate opportunity of presenting their case. A denial of such an opportunity is a denial of natural justice to the affected landholders. The Act which violates natural justice as described above is to that extent a negation of law, and is in that respect opposed to Article 265 of the Constitution which enacts that no tax shall be levied or collected except by authority of law. The Act has, therefore, to be suitably amended by the provision of an adequate opportunity of hearing for the assessee landholder in reference to both the issues involved in the assessment of the Betterment Contribution *viz.*, (1) the classification of the lands ; and (2) the determination of the contribution per acre in each class of lands.

1. L.R. (1915) A.C. 120 at 132.

THE RULE OF LAW AND THE LAW OF KARMA

By

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Under the purple canopy of British Jurisprudence, the doctrine of the Rule of Law reigns in glory ; and it is a good augury to mankind that the sceptre of its juristic power is penetrating into the legal systems of several nations of the globe.

Looked at from a juristic point of view, the Law of Karma is no less adequate, sound, and utilitarian than the doctrine of the Rule of Law. The genius of a jurist like Prof. Dicey should appear on the Indian scene to study and expound it thoroughly to the world, clothing it, if possible, in a modern mantle, consistent with the challenge of the present scientific age.

For one thing, both laws are compatible only with order and reason, and therefore with justice, and incompatible with the exercise of arbitrary power of man, nay, even of God. The golden thread that runs through the web of the Law of Karma is that inexorably evil consequence flows from evil act, and likewise inexorably good from good. Hence man should prefer to do good act or good Karma, and not bad act or bad Karma. This injunctive part of the Law apart, which is simple enough, the Law of Karma proclaims, as a sober fact and not as a mere hypothesis, that the actual suffering of man disproportionate to his present relative merit is due to his past Karma. Some may doubt that the punishment suffered in one life for an evil in a previous embodiment is not really personal, as the very basis of that theory, *i.e.*, the doctrine of re-incarnation and transmigration of soul, is itself doubtful. But how else can we adequately explain that one issue of the same parents is a born cripple or becomes wedded in later life to extreme poverty, while another of the same set of parents is born perfect in limbs or enjoys in later life large affluence. While thus the ambit of the Law of Karma transcends the limits of one's life, and seeks to explain the disquieting positions in life to which man, without any conceivable cause proceeding from himself, is a helpless heir either at birth itself or later in the same life, the Law of Karma is, ethically and sociologically, superior to the Rule of Law.

I am no *laudator temporis acti.* Still I cannot but praise the ancient Hindu juris-theologians, who expounded the Law of Karma, which through its synthesis of clock-work requital, good for good, and bad for bad, working sometimes in the same life, and sometimes in later life, the disparities and differences, noticeable between one human being and another have been adequately explained.

To put the matter in another light, the reconciliation of the facts of life with the claims of abstract justice is made completely possible by the Karmic Law. The excellence of this Law lies in that facet. Like the Rule of Law, it enunciates the equality of man before Law, and the exclusion of the idea of any exemption of any class of people from the duty of obedience to law, be it juristic or ethical, the breach of which brings in its train retribution.

While the one is essentially the product of an ancient juris-theology, and the other of a recent jurisprudence of another clime, it is a marvel that juristically considered, both have several elements of similarity.

RIPARIAN RIGHTS

By

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Rights arising to the user of the waters of a natural stream in favour of persons owning lands abutting on the stream are called riparian rights, from the Latin word *Ripa,* a thing with banks. "A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream."[1] A riparian right is a natural right. It is not an easement right and it is not lost by non-user. Coulson and Forbes define a natural water-course as "a body of water issuing *ex jure naturae* from the earth, and by the same law pursuing a certain direction in a defined channel, till it forms a confluence with wide water."[2] According to Jessel, M.R.,: "A spring of water means a natural source of water of a definite and well marked extent. A stream of water is water which runs in the defined course, so as to be capable of diversion; and it has been held that the term does not inclue the percolation of water underground".[3] Lord Sumner in *Stollmeyer* v. *Trinidad Lake Petroleum Co.,*[4] observes: "a river may be fed by the rains directly without any intermediate collection of the water in the bowels of the earth, and still be a river and a river which naturally runs during a great part of the year does not cease to be a river merely because it is accustomed to become dry". In India this was recognised in *Harihara Prasad* v. *Mt. Janak Dulari*[5] and in *Ramsewak* v. *Ramgir.*[6] In the latter case Narayan, J., observed: "in this case the reasonable conclusion will be that the stream has its origin in the Himalayas. The obvious inference is that it is formed out of the water which comes down from the Himalayas through the jungles and anybody who has got some idea of the conditions prevailing in the Himalayas will at once understand that in that biggest mountain range on the earth streams are formed out of the snow water flowing from the glaciers which may include the water of the rains falling on that big mountain; and as was pointed out by Meredith, J., even if such a stream does not flow continuously through the year it will be regarded as a natural stream." The Indian Easements Act in the *Explanation* to section 7 defines a natural stream thus: "a natural stream is a stream, whether permanent, or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only, and in a natural and known course."

Every water-course consists of (*a*) the bed; (*b*) the bank or shore; and (*c*) the water[7]. Lord Campbell, C.J., in *Abraham* v. *Great Northern Railway*[8] defined the bed of the river thus: "The bed of the river is the alveus, as distinguished from the shore and from places where flood waters occasionally

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1. *Secretary of State for India* v. *Subbarayudu,* 62 M.L.J. 213 : L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268 at 276.
2. Coulson and Forbes: "Waters and Drainage", p. 76.
3. *Taylor* v. *Corporation of St. Helens,* (1877) L.R. 6 Ch. 76 at 273.
4. L.R. (1918) A.C. 485 at 491.
5. A.I.R. 1941 Patna 118 at 128.
6. A.I.R. 1954 Patna 320 at 321.
7. Angell : "Water-courses", p. 40.
8. (1851) 16 Q.B.D. 592.

collect. The bank is the outermost part of the bed in which the river naturally flows."[9] Where the river is tidal and navigable, the river is said to belong to Government. "The bed of all tidal rivers where the tide flows and reflows, and of all estuaries and arms of the sea is by law vested *prima facie* in Crown"[10]. Where the river is non-tidal, every proprietor on either side of the bank of a non-tidal river is entitled to the land underlying in the water upto an imaginary line drawn along the centre of the river, and it is known to the law as the *medum filum aquae*. It has long been recognised in India that the beds or channels of tidal navigable rivers are the property of the Government.[11] In *Secretary of the State for India* v. *Subbarayudu*[12] the meaning of the expression "river belonging to the Government" was discussed by the Privy Council. The Privy Council observed: "a river only belongs to the Government when the *solum* of the stream belongs to the Government. This will happen either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable." The question of the ownership of the bed of a river, when it is non-tidal arose in *Maharaja of Pithapuram* v. *Province of Madras*.[13] The Privy Council agreed with the law as it obtains in American States where the rivers are generally large rivers as in India and came to the conclusion "that the appellant's contention, that the English common law rule that the bed of non-tidal rivers belongs to the riparian proprietors should apply to Madras, not only runs counter to the trend of judicial dicta but conflicts with good sense, and that the rule to be applied is that the bed of a navigable river in any part of India, whether tidal or not is vested in the Government unless it has been granted to private individuals".

The natural rights of the riparian owner are threefold; "First he has a right of user. He can use the water for certain purposes. Secondly, he has a right of flow. He is entitled to have the water come to him and go for him without obstruction. Thirdly, he has a right of purity. He is entitled to have the water come to him unpolluted."[14] The natural rights of a riparian owner in a natural water-course were elaborately discussed in *Embrey* v. *Owen*[15] by Parke, B., thus: "The right to have a stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

This right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state, but is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

9. Coulson and Forbes: "On Waters and Drainage", p. 79.

10. *Ibid.*, p. 84.

11. *Dawood Hashim Esoof* v. *Tuck Seim*, 60 M.L.J. 593 : L.R. 58 I.A. 80 : (1931) I.L.R. 9 Rang. 122 (P.C.).

12. 62 M.L.J. 213 : L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268.

13. (1949) 1 M.L.J. 128 : L.R. 75 I.A. 305 : I.L.R. (1949) Mad. p. 675 at 690.

14. Gale on "Easements", p. 231.

15. (1851) 6 Exch. 369.

It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie; for such a use it will lie, even though there may be no actual damage to the plaintiff."

Every riparian proprietor has a right to the reasonable use of the water. What is 'reasonable' was discussed by Lord Kingsdown in 1858 in *Miner* v. *Gilmour*.[16] "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of deficiency, upon proprietors lower down the stream. But, further, he has a right to use it for any purpose; or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury". In *Swindon Co.*, v. *Wilts Co.*,[17] the appellants were riparian owners. They claimed the right to collect the water of the stream into a permanent reservoir to supply to an adjacent town. The Court observed that it was not a reasonable use of the water within the meaning of the rules. In 1875 Lord Cairns summed up the law on the subject thus: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water. That is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, further, there are uses no doubt to which the water may be put by the upper owner, namely uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner and the water may be restored after the object of irrigation is answered in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner, for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon that subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable one. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water." In the present case, there was no reasonable user of the water by the upper owner: "It was a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes—and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream." Lord Macnaghten in 1904, in *McCartney* v. *Londonderry Co.*,[18]

16. (1858) 12 Moo. P.C. 156.
17. (1875) L.R. 7 H.L. 697.
18. (1904) A.C. 301.

stated the law in similar terms. A railway line belonging to the respondents crossed a natural stream, and at the crossing abutted upon the stream for about eight feet on each side. The respondents inserted a pipe into the stream. The pipe was laid along the strip of the railway line. By means of this pipe, the respondents diverted water to other land belonging to them, about half a mile away from the stream. They consumed the water there for working their locomotive engines.. The appellant who was a lower riparian owner upon the stream stopped the pipe. Thereupon the respondents brought an action for a declaration of their right to take water through the pipe and for an injunction. The Court held that the appellant was justified in the course taken by him and the action failed. Lord Macnaghten observed: "There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes —sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all......In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower riparian owner can complain of that. In the exercise of rights extraordinary but permissible the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purpose for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character." The decision of the House of Lords in *McCartney* v. *Londonderry Co.*,[19] was followed by the Privy Council in *Secretary of State* v. *Subbarayudu.*[20] When the upper riparian owner diverts the water for non-riparian purposes, he can be restrained by the lower riparian owner and he need not prove any special damage; or diminution in the water flowing to his riparian tenement, in order to sustain his right of action.[21] The riparian owner in India is entitled for a reasonable quantity of water for irrigation purposes. In *Secretary of State* v. *Subbarayudu,*[20] the plaintiff took water from a certain channel, the Chilapa Kalava, for irrigating his inam land and the Government imposed upon him water-cess under the Madras Irrigation Cess Act VIII of 1865, as amended by Madras Acts V of 1900, II of 1913, and VIII of 1914. The plaintiff paid the cess under protest and filed a suit alleging that he had a riparian right to take water for cultivating his land without payment of cess and claimed refund. After reviewing the English decisions the Privy Council held that "the plaintiff had absolute right to take the water and use it for irrigation of his property, for there is no complaint at the instance of a lower proprietor that too much has been taken, and he uses it for his own property alone." The facts in *Urlam Case*[22] are also instructive. The meaning of the term 'engagement' was discussed. Urlam

19. (1904) A.C. 301.

20. 62 M.L.J. 213 : L.R. 59 I.A. 56 : I.L.R. 55 Mad. 268.

21. *Aiyavu Moopan* v. *Swaminatha Kavundan,* I.L.R. 28 Mad. 236.

22. *Prasada Rao* v. *Secretary of State,* 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886.

was one of four Zamindaries formed under a scheme to utilise the waters of the river Vamsadhara for purposes of cultivation. Four channels were constructed each with head work and sluice to take water from the Vamsadhara into the interior. The area which could be benefited by the four channels for purposes of cultivation, was made up into four Zamindaries each containing one channel with the sluices and weirs within the limits of the last Zamin. The ancestors of one Prasad Rao had acquired the proprietorship of the Urlam Zamin. They were able to expand cultivation in a large measure through their enterprise, by converting single crop land into double crop, and dry lands into wet lands. The Government of Madras levied water cess under the Madras Irrigation Cess Act. The appellants paid the cess under protest and filed a suit for the refund of water cess paid. Three interesting questions were raised in this case: (1) Whether at the point where the Urlam channel took off from the Vamsadhara, the river belonged to the Government; (2) Assuming that the river belonged to the Government, was there any 'engagement' by which the State had to supply water, free of charge, to the appellant; and (3) if there was such an engagement what were the limits to the use of water by the appellant. The Privy Council pointed out that the ownership of a river at any point would be determined by virtue of the ownership of lands on either side at that point. Even assuming that the Vamsadhara belonged to the Government, no cess could be levied for the use of the water because by reason of the Permanent Settlement concluded with the Zemindar, the latter had an implied right to free supply of water for purposes of cultivation. In regard to the use of water, the land-holder should not in any way tamper with either the configuration, or the physical dimensions of the channel or its head works, as they stood at the time of the Permanent Settlement. The landlord by careful use of the water may cultivate more lands or raise more crops; but he will not be liable to pay water cess on that account. The same principle equally applies to inams also.[23] In the *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*,[24] at the time of the Inam Settlement the Plaintiff-Respondent's land in the inam village of Vadagarai was 115 acres and it was cultivated with the waters of Pachayar river. Since then 33 more acres and odd have been converted into wet with the water of Pachayar river. The question in dispute was as to the right of the Government to levy water cess under the Madras Irrigation Cess Act of 1865 on those 33 and odd acres of land in the inam village of Vadagarai belonging to the plaintiff respondent. The plaintiff had conducted a portion of the water from the irrigation source by means of channels into his tanks for the purpose of irrigation. Abdur Rahim, J., in the course of his judgment explained the word 'reasonable use' of the water, as follows: "In fact, it is common ground that this river like many other similar rivers in this Presidency is and has always been used in this way, in irrigating lands situated on both sides. In this country, the user of streams and rivers for irrigation through a system of connected tanks which are filled with water obtained by means of channels is a most valuable right and has been recognised from the most ancient days......In this Presidency, in most cases where the stream is small, the whole or a greater portion of the water is diverted by means of channels into tanks by the different proprietors putting up dams in the stream in turn for some days. If the supply is not sufficient for all the adjacent proprietors, the quantity and extent of land which each proprietor is entitled to irrigate may depend on well-established usage, on mutual arrangement or on the terms of a grant. There is no rule of law in this country so far as it can be ascertained that the right to irrigation by a riparian owner is confined to any particular

23. *Secretary of State for India* v. *Sri Varada Thirta Swamigal*, (1942) 2 M.L.J. 367.
24. (1917) 33 M.L.J. 415 at 424.

quantity of land. The criterion is whether the extent or mode of enjoyment claimed is reasonable (see *Embrey* v. *Owen*;[1] *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk*.[2]) 'A user which is not objected to and is in fact adopted by and is for the benefit of all the riparian proprietors must, in my opinion, be held to be reasonable and it is not open to a third person such as the Government unless it happens to be a riparian proprietor, to raise any question so far as this is concerned''. His Lordship also explained the meaning of the words ''standing and flowing water''. By the words ''standing and flowing water'', in section 2 of Madras Act III of 1905 is meant ''the water and the land on which is stands, or over which it flows, the whole taken together collectively and not the mere liquid apart and separate from the land.'' In the end his Lordship held that the burden was on the Government to show that the Inamdar had been actually storing in his tanks more water than he was entitled under the engagement with the Government at the time of the Inam enfranchisement or settlement. It was found that ''the plaintiff is not drawing more water than what he and his predecessors in title have been taking from time immemorial, that the present system of irrigation has been in existence from before the Inam Settlement and that the plaintiff is now using the existing system of irrigation in the same way as his predecessor was using at the time of the Inam Settlement''.[3] In the end their Lordships Abdur Rahim and Srinivasa Aiyangar, JJ., held that in the circumstances of the case, the claim of the Government to levy water cess on the excess area brought under cultivation since the Inam Settlement was untenable. In *Lakshminarasu Avadhanulu* v. *Secretary of State for India*,[4] Sadasiva Aiyar, J., observed ''in India riparian land must be confined to land which is on the bank of the stream and which extends from that bank to a reasonable depth inland and a depth of more than a furlong would, usually be unreasonable.'' In the course of his judgment his Lordship pointed out that the Government had no right to levy separate water cess for the use of such water whether the bed of the stream whose water is used by an Inamdar or a Zamindar to irrigate his riparian lands bordering on a natural stream belongs wholly to Government or partly to Government and partly to the Inamdar or Zamindar or wholly to the Inamdar or Zamindar. It was also held that a riparian owner in India has a natural right not merely to lift water from a natural stream and carry the lifted water directly to the land at once, but also the right to store such lifted water in wells temporarily before carrying it on to the irrigated lands.

As regards the riparian right to the flow of the water, the English law was stated by Kerr in the following terms: ''When land is so located that water naturally or in the course of ordinary agricultural operations, such as by deep ploughing, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do anything to prevent the course of such water. If he builds a wall at the upper part of his estate so as to prevent the water from descending in it, whereby the land above is damaged, there is an actionable injury. The owner of land lying on a lower level is, subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations such as by deep ploughing, from land on a higher level. The upper proprietor may not, by adapting a particular system of drainage, or by introducing alterations in the mode of drainage cause the drainage water to flow on his neighbour's land in an injurious manner, or obstruct the drainage of the other lands by overloading the ancient drains with

1. (1851) 6 Ex. Reports 355.
2. (1878) L.R. 4 A.C. 121, 126.
3. (1917) 33 M.L.J. 429. Per Srinivasa Aiyangar, J.
4. (1918) 34 M.L.J. 223 at 226.

water".[5] This principle was followed in *Ramaswamy* v. *Rasi*.[6] In *Menzies* v. *Breadalbabe*,[7-8] the House of Lords held "that a proprietor of land on the bank of a river ought to be restrained from erecting a mound, which if completed, would in times of ordinary flood throw waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them". A riparian proprietor can protect himself against ordinary floods if he can do so without injury to others.[9] In the case of extraordinary floods, every landowner exposed to the inroads of the sea has the right to protect himself by erecting such works as are necessary for that purpose and if he acts *bona fide* he is not liable for any damage occasioned to his neighbours who must protect themselves as best as they can.[10] The above principles were followed in *Venkatachalam Chettiar* v. *Zamindar of Sivaganga*.[11]

Every riparian owner in English law as well as in Indian law is entitled to the flow of water in its natural state of purity without sensible alteration in its character or quality. "Pollution means the addition of something to water which changes its natural qualities so that the riparian proprietor does not get the natural water of the stream transmitted to him. Thus, the addition of hard water to soft water; the raising the temperature of the water and the addition of something which on meeting some other substance already in the water each in itself harmless, caused pollution, have all been held to constitute pollution."[12] The natural right to purity extends to underground waters also. A riparian proprietor can maintain an action to restrain pollution without proving that there has been actual damage.

Where an *artificial water-course* is made by a man on his own land, no question as to the ownership of the soil, or the rights over it can arise; but the case is different when such a water-course is constructed on the land of another. In such a case a right to the water-course can be created only by grant or by some arrangement or by long-continued enjoyment or by Act of Parliament. The Privy Council pointed out the distinction between natural and artificial water-courses in *Ramessur Persad* v. *Koonj Behari* thus:[13] "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial water-course constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is, *prima facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment, as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin." The same principle was applied in English cases also.[14]

When water flows through a natural stream having a channel defined and known but which is underground, the owner of the soil under which the stream flows can maintain an action, if interference of the flow took place under such

5. Kerr on Injunctions, 4th Editon, page 195.
6. 25 M.L.J. 276 : I.L.R. 38 Mad. 149.
7 & 8. 3 Blingh. N.S. 414.
9. *Rex* v. *Trafford*, 8 Blingh. 204.
10. 8 B. & C., 355 (*Rex* v. *Pagham Commissioners*).
11. 14 M.L.J. 162 : I.L.R. 27 Mad. 409.
12. Coulson and Forbes : "Waters and Drainage", p. 179.
13. I.L.R. 4 Cal. 633 at 637.
14. *Kensit* v. *Great Eastern Railway Company*, (1884) 27 Ch. D. 122.

circumstances, as would have enabled him to recover if the stream had been wholly above ground.[15] Prescriptive rights may be acquired in the case of water flowing through a natural stream with a defined channel.

In a case where water percolates in an undefined course, no right to the uninterrupted flow can be acquired by prescription for, as regards this water, there is no presumed grant and hence there can be no prescriptive right in water flowing in undefined channels. In *Chasemore* v. *Richards*,[16] *A*, a landowner and millowner enjoyed the use of a stream for over 60 years which was supplied by percolating underground water. The adjoining owner dug on his own ground an extensive well for the purpose of supplying water to the inhabitants of the district. Consequently, *A* lost the use of the stream and the Court held that, *A* had no right of action. The principle was that the owner of land who had underground water percolating in undefined channels and flowing to the neighbouring land, has the right to appropriate the percolating water within his own land so as to deprive his neighbour of it. But this principle was rejected by the Madras High Court in *Basavanna Gowd* v. *Narayana Reddi*.[17] The Court observed that the principles of English law regarding underground streams defined and undefined, do not apply to irrigation channels taking sub-surface water in India, because the conditions in England are different from India. In India the supply of water for irrigation is from the Government source and it is unknown in England. Secondly, "the running of a river current down its natural bed in the dry season a few inches below the sandy surface is a phenomenon unknown in England. The underground water to which the English cases apply is usually water between the layers of subterranean rock or clay so hidden that no one can guess what their course is. In this country it is fairly safe to say that the under-current of a river is probably flowing down the river bed and that its course is defined in the sense that one will probably be able to tap it somewhere in the river bed and the water thus is found in, and has not left, the recognised irrigation source, namely, the river. Finally, the English cases are usually contests between the owners of the surface property under which the subterranean water originally was and the owner of the surface under which it was subsequently found and the crucial question was whether the ordinary rights of ownership extended to such water. In India there is no question of rival owners of the surface lawfully using their own lawful property and claiming that the ownership of the surface imports ownership of and property in sub-soil water, but a question of the rights of rival claimants to water which is the property of a third party, namely, Government".

The meaning of percolation was considered by the Madras High Court in the *Secretary of State for India* v. *Mahadeva Sastry*.[18] Mr. Mahadeva Sastry raised some plantain saplings on his dry lands abutting an irrigation channel. The Government charged him with water-cess, because he raised plantain saplings through percolation, the benefit of which accrued to him. Mr. Mahadeva Sastry contended that percolation was not visible and he was not liable to pay water cess. The Court defined percolation as defined in the Oxford New English Dictionary: "Percolation means passing through a porous substance or medium, or filtering, oozing, or trickling through". "Irrigation by percolation is equivalent to watering by means of water which oozes through the sub-soil and passes to the land to be irrigated". The Court held that though percolation was not visible on the surface, the presence of the moisture in the

15. *Dickinson* v. *The Grand Junction Canal Company*, (1852) 7 Ex. 282.
16. (1859) 7 H.L.C. 349.
17. 61 M.L.J. 563 : I.L.R. 54 Mad. 793.
18. 32 M.L.J. 411 : I.L.R. 40 Mad. 58.

soil beneath the surface was admitted and would not be accountable for except through a process of percolation. Mr. Mahadeva Sastry contended that the user of the water if any was involuntary. This argument was also rejected, for the reason that plantations are suckers, and when they are raised in preference to other dry crops, it can only be with the knowledge that the roots can suck and absorb the water.

Right to the flow of water in undefined channels was also recognised by the Indian Easements Act. Section 7 *Illustration* (i) states: "the right of every owner of upper land that water naturally rising in or falling on such land, and not passing in defined channels shall be allowed by the adjacent lower land to run naturally thereto". In *John Young and Co.,* v. *Bankier Distillery Co.,*[19] Lord Watson observed: "The right of the upper heritor to send down, and the correlative obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them." The common instance of water flowing in undefined channel is rain water falling on a tenement. The upper heritor has a natural right of drainage in respect of surface water. The upper heritor can collect the water and let it down to the lower tenement.[20] The natural right of the upper heritor for the drainage is also extended to spring waters.[21] The lower heritor is bound to receive the water if it naturally flows on to his land. In *Whatley* v. *Lancashire and Yorkshire Railway Co.,*[22] owing to extraordinary rainfall, water accumulated against the defendant's railway embankment. To protect the embankment, the railway authorities cut trenches with the result water flowed to the plaintiff's land and caused damage. It was held that the railway company was liable for damages. The lower heritor was not bound to receive foreign water.[19] The lower heritor should not obstruct the natural flow of the water by raising artificial barriers, so as to accumulate the water on another's property. There is a natural right for an upper owner to let down the water to flow down to the lower land and there is also a natural right of a lower owner to build on his own land. But between the natural right of an upper owner to let down the water to flow down to the lower land and the natural right of a lower owner to build on his own land, the former shall prevail against the latter. The owners of the adjoining lands can improve their lands to any extent as they pleased, provided they make suitable arrangements for the carrying of the water from their neighbour's land.[23] The upper heritors are not permitted to pollute the water in undefined, underground channels also, so as to affect the quality of the water reaching the lower heritors.

The foregoing survey shows that under the English Common law if a river is tidal and navigable, it belongs to the Crown, and the bed of a river does not vest in the Crown unless the river is tidal. But in India the bed of a navigable river whether tidal or not is vested in the Government, unless it is granted to private individuals. If the river belongs to the Government a riparian owner cannot lay a dam and divert the water. (See *Secretary of State* v. *Subbarayudu.*[24]) Subject to this limitation, all other riparian rights are available. If the river is not owned by the Government, the adjoining owner can construct a

19. (1893) A.C. 691.
20. *Adinarayana* v. *Ramudu,* 24 M.L.J. 17 : 37 Mad. 304.
21. *Nagarathna Mudaliar* v. *Sami Pillai,* 71 M.L.J. 187.
22. 13 Q.B.D. 131.
23. I.L.R. 49 Mad. 445.
24. 62 M.L.J. 213 : I.L.R. 55 Mad. 268 : L.R. 59 I.A. 56.

dam for use temporarily. Riparian rights are thus (*a*) rights of ordinary user; and (*b*) rights of extraordinary user. Ordinary user means the consumption of water for domestic purposes, for watering cattle, etc. Extraordinary user signifies on the other hand acts like irrigation or using the water for manufacturing purposes. A riparian owner may exhaust the entire water flowing in the stream for ordinary purposes. To the use of water for secondary or extraordinary purposes, there are certain limits, namely, he is bound after such use to leave the water substantially undiminished in volume and unaltered in character. Where an upper riparian owner diverts the water for non-riparian purposes, he can be restrained by the lower riparian owner by injunction. The lower riparian owner is entitled to the natural flow of the water from the upper heritor. The upper riparian owner cannot allow water brought by him into his land to drain into his neighbour's land. A riparian owner can also maintain an action for pollution of the water. He need not prove any damage. Where a watercourse is artificial, any right to the flow of water must rest on grant or arrangement.

NOTE ON THE REVISED MADRAS CRIMINAL RULES OF PRACTICE

By

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It is unfortunate that the needs of inferior criminal Courts and that parties appearing before them were not kept in view while the Criminal Rules of Practice were revised. Useful provisions in the old rules have now been deleted; new provisions and changes in the old rules that are necessary have not been made.

Old rules 39 and 82 have been injudiciously omitted. The Code does not provide as to what happens to the charge when the accused dies during the enquiry or trial. No doubt he escapes the territorial jurisdiction of the state and the charge against him cannot be pursued any longer. But we are legalistic and "law-ridden" and need a convenient label for closing a case to the satisfaction of the superior magistrates who review calendars of judgments. The familiar labels of conviction, discharge or acquittal do not fit in and old rule 39 judiciously provided that the charge abated. It also provided a way out when the prosecution was recalcitrant by enabling the magistrate to acquit or discharge the accused if after notice thereunder the prosecution failed to adduce evidence. This rule had a salutary effect and checked the prosecution from degenerating into persecution.

Where there are numerous accused in a case (such as rioting or affray cases) or where several members of a family are arraigned it is quite a problem to secure their attendance at every hearing. With the permission of the magistrate one co-accused could represent his co-accused during the enquiry or trial, under rule 82. This was a veritable boon to the parties. It also helped the Court greatly because the absence of one or some of the accused did not suffer as care was taken to secure the presence of an accused when his identity became material. The revised text limits such representation only to *appeals* where the need is not so great or universal as in the trial Courts.

Vakalaths and affidavits can be attested and sworn by other advocates and pleaders as per amended Civil Rules of Practice. What are the special reasons for not amending the Criminal Rules of Practice in conformity therewith? Are advocates and pleaders unworthy of this privilege?

The old rule relating to payment of search fee on copy applications was unjust. Thus if judgment is delivered on the 31st December and copy is applied for on the next working day the party is compelled to pay a search fee of Re. 1 for no default on his part. The corresponding rule in the Civil Rules of Practice requires search fee only when the application is made one year after the disposal of the suit or other proceeding. As criminal proceedings involve the life and liberty of citizens, they should not be harassed by fees of this sort. But the revised text sticks to the old rule.

The incubus of periodic inspections by the superior Courts and unfavourable remarks on the maintenance of records sits so heavily upon the Magistates that they insist upon payment of Court-fees in matters in which no Court-fee

is payable, such as report of compromise under sections 345 (1), Criminal Procedure Code, memo. for return of documents, etc. The Magistrates should be told that illegal collection of Court-fees is as much blameworthy as non-collection of Court-fees legally due.

There should be some provision in the Criminal Rules of Practice for presentation of papers by litigants and advocates in the trial Courts throughout the office hours, similar to rule 248 relating to appeals. In the absence of such a rule, even if the litigant is late by a few minutes when the Magistrate takes his seat and papers are called for, he is sent away. With the ideal of the integration of the civil and criminal judiciary being steadily pursued is it not better to provide for the presentation of papers in all criminal Courts during the office hours?

I now come to a matter which is not free from doubt or controversy. In some stations at least the Sub-Magistrates are overworked and have to dispose of numerous petty cases involving much clerical work. It appears to me that there is no harm in permitting the Magistrates, by framing an appropriate rule, to write judgments using printed forms in "admission" cases. Section 367 (1), Criminal Procedure Code, which says that every judgment should, except as otherwise expressly provided by the Code, be written by the presiding officer of the Court or from the dictation of the presiding officer need not be construed narrowly that *every part* of the judgment should be *in the handwriting* of the Magistrate. The course suggested by me will save the Magistrates a loss of tedious manual work and will not impair justice or efficiency. Are not printed forms used for warrants of arrest, of commitment, etc? Do they become less solemn or awesome by being partly in print.

STATE BARRIERS*

By

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It is only in a federal or *quasi* federal system that the problem of State barriers can arise. Modern federation is a product of the labours of the Philadelphia Convention which met in 1787 and produced the United States Constitution in 1789. The Constitution which immediately preceded the present Constitution of the United States 1789 was known as the Articles of Confederation. The Confederation was a miserable failure as the central agency erected by it was subordinated to the Governments of the thirteen original colonies, each of which was in no mood to part with even the smallest fraction of its sovereignty in favour of the Central Agency or Common Government.

THE PRESENT U. S. CONSTITUTION.

Some other formula had, therefore, to be found and that was found by the Philadelphia Convention. The federal structure that has been erected by the present United States Constitution represents the many compromises reached by the hard-headed-men that were in charge of the framing of the Constitution. The primary problem that the framers of this Constitution had to face was to bring into existence a federal Union which would give an effective and efficient Government in respect of matters common to all the federating colonies or states committed to its care by the constitutional instrument. This apart the framers of the Constitution were anxious to concede to the states as much autonomy as possible so that they may have their own free political life.

WHAT REALLY THE CONSTITUTION HAS DONE.

Since the commencement of the United States Constitution, the Federal Government and the State Government acting in their respective spheres fixed by their Constitutions have operated over all persons and things in their territorial limits. The United States Constitution acts not only over the State but over the State citizens. A State citizen is as much subject to the laws of the American Union as of his own State. The position is, all persons in the United States are subject to one National Government in respect of matters governed by the federal Constitution and they are equally subject to the State Governments now fifty in number which are not instrumentalities of the National Government but independent political units. It is this concurrent jurisdiction of the National and State Governments over men and things in a particular area that has given rise to the problem of the power of the State Government coming in the way of the National Government in particular matters. This problem had to be faced and was faced by the other federal and *quasi* federal structures that came in after the United States in their own ways. It is known that Article IV, sections 1 and 2 of the Constitution are but adaptations of the inter-State comity provisions of the Articles of Confederation that preceded it. These sections deal with full faith and credit in respect of public acts, records and judicial proceedings of one State in the other States of the Union and with citizens of a State who shall be entitled to all privileges and immunities of citizens in the other States and other questions such as the surrender of fugitives from justice, formation of a State within a State and so on.

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Article 1, section 10, paragraph 3 states that no State shall without the consent of Congress lay any duty of tonnage, keep troops or ships of war in times of peace, enter into any agreement or compact with another State or foreign power or engage in wars unless actually invaded or in such imminent danger as will not admit of delay. Under Article 3, section 2 the Federal judiciary gets jurisdiction over inter-State disputes and Article 1, section 8 enumerates the powers of Congress of which the one to regulate commerce with foreign nations and among the several states and with the Indian tribes represent really what may be truly called an inter-State compact.

THE NATURE OF THE U. S. CONSTITUTION.

The United States Constitution is a written instrument and in theory, at any rate, its meaning does not alter. This organic instrument as contrasted with either the Canadian Constitution or the Indian Constitution, does not provide all the details of its working. Its language is general in its terms and embraces all situations arising as a result of changes in the social, economic and political life of the community it governs through its processes. As Bernard Schwartz points out, it is not a self executing instrument and the *ought* of it to become *is* must run the gauntlet of judicial interpretation. Hence the pivotal position the Supreme Court occupies in the United States Constitutional system. The Constitution is what, therefore, the Court says it is. It is in this background the American constitutional doctrines will have to be looked at. Contrasting the New York Court of Appeals with the United States Supreme Court Cardozo, J., told Jackson, J., in private conversation that the former is a great common law Court ; " its problems are lawyers' problems " but the latter is occupied chiefly with statutory construction, which no man can make interesting and with politics and politics was used not in the sense of partisanship but in the sense of policy making. The Supreme Court is different, therefore, from any other law Court. The Supreme Court is mostly concerned with political questions in legal form. It has been rightly pointed out that all constitutional interpretations produce political consequences. The doctrines evolved by the judicial statesmen of this Court have produced far reaching consequences. Later Courts have discarded outmoded doctrines of earlier Courts and looked to new doctrines in the light of changed political and economic conditions.

THE PROBLEM OF STATE BARRIERS—HOW IT ARISES ?

In the United States unlike in Canada or India, the States are completely free to order their houses in any manner they please, subject only to the limitations or restrictions imposed by the National Constitution. The States cannot do violence to the demands of XIV Amendment, cannot erect barriers against inter-State commerce, run away from a republican form of Government or efface the express and implied prohibitions imposed on them by the Constitution. So long as the States remain within these lines, the national Constitution has nothing to do with them.

The national Government exercises exclusive powers under the Constitution in foreign and external affairs and this apart the national Government can exercise only such of those powers that have been granted to it expressly or impliedly by the Constitution and those powers have been taken away from the States and lodged in the Nation. The powers granted to the national Government are, therefore, prohibited to the States and the grant of power to the national Government to regulate commerce among the several States is unaccompanied by any limitation on the state power in this field—the fact of the matter is a great deal of control over inter-State commerce remains in the states and this is how the problem of state barriers against inter-State commerce alone arises under the United States Constitution.

POWERS OF THE CENTRE IN THE UNITED STATES.

The power of the Congress to regulate inter-State commerce has been held by the Judiciary to prevent the States from erecting commercial barriers for whatever reason. It is not only that commercial barriers but all other barriers

which may impede the exercise of the power of the central authority that are banned by the Constitution. The sovereignty of each of the states of the American Union is necessarily subject to these limitations araising from the grant of powers by the Constitution to the processes erected by it, as otherwise " the more perfect union " objective of it may have failed completely.

The Union that was there prior to the coming into force of the present United States Constitution was so loose as to be of no use at all and, therefore, it was a more perfect union was aimed at and realised by the present Constitution of the United States in order to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare and secure the blessings of liberty not only to themselves, who were there at the time of the framing of the Constitution but also their posterity.

WORKING OUT OF THE OBJECTIVES OF THE U. S. CONSTITUTION.

The objectives thus indicated have been really worked out in the seven Original Articles and the twenty two Amendments that followed these Articles. The powers of every one of the processes at the Centre are as clearly delimited as possible and the jurisdiction of none of them can be trenched into by any state action, though every one of the States is governed by a Constitution of its own. In other words whatever barrier that a State may erect whether against the Union or against its neighbouring State or States, can only be in respect of matters which do not fall within the Union jurisdiction.

The United States Constitution for the first time understood a federal union as a political system in which by a well understood mutual concession on the part of the federaling units, local loyalties could not only be preserved but reconciled with the unity of the nation as a whole which the Constitution governs. But this great political concept very nearly failed and the Union was on the verge of collapse in the Civil War. This situation had a message of its own when the Canadians framed their own federal structure in the British North Amercia Act, 1867. The vital core of this Constitution is the division of legislative power between the Union and the Provinces, making the Union all powerful and in sections 91, 92, 93, 94 and 95 of the Canadian Constitution (the British North America Act) the lines of division of legislative powers are indicated. Section 92 enumerates the items over which the Provinces have exclusive power to make laws and among other items, " Property and Civil rights " is about the most important. Section 91 says that the Dominion has the power to make laws for the peace, order and good Government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Provinces are reserved to the Union—a process of distribution which is the reverse of X Amendment of the United States Constitution which say that powers not delegated to the Union, nor prohibited to the States are reserved to the States. By way of illustration, the important powers of the Dominion Parliament, among which regulation of trade and commerce is also one, are set out. In view of the scheme of distribution of legislative powers and other overriding powers given to the Central Government when it legislates for the peace order and good Government of Canada Viscount Haldane, L.C., in the *Attorney General of Australia* v. *The Colonial Sugar Refining Co.*[1], observed that Canada cannot be described as federal except in a loose sense. This federation in a loose sense is what Prof. K. C. Wheare calls a *quasi* federation. If Canada is *quasi* federal, India is also *quasi* federal. As compared to the Canadian Constitution, the Indian Constitution contains more provisions which detract from its pure federal character.

These features apart, it will have to be borne in mind with reference to any type of federal system, that " no amount of care in phrasing the division of powers in a federal scheme will prevent difficulty when the division comes to be applied to the variety and complexity of social relationships. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mecha-

1. L.R. (1914) A.C. 237.

nical application of the division of powers. There is nothing in human affairs which corresponds to the neat logical division found in the Constitution. Therefore, attempts to exercise the powers alloted by the Constitution frequently raise questions as to its meaning in relation to particular circumstances" (Bora Laskin on *Canadian Constitutional Law*).

A comparatively recent attempt on the part of a State against another State of the United States to raise economic barriers in relation to entry of goods or citizens of the other on the ground of indigence has been resisted by Court decisions. In *Baldwin* v. *Seelig*[2], it was pointed out that

"It is one thing for a State to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices for use in other States, and to bar the sale of the products, unless the scale has been observed".

In *Edwards* v. *California*[3], the Court has struck down a State statute which penalised the bringing into it of indigent persons not its residents, with no relations or friends to support them. It has been observed that there are permissible areas of State legislative activity in the exercise of its police power and a State cannot seek to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. The right to move from State to State, it was pointed out, is an incident of national citizenship protected by the privileges and immunities clause of XIV Amendment against State interference. In *International Text Book Co.* v. *Pigg*[4], it was held that a State cannot deny to a foreign Corporation the right to maintain an action in its own Courts for goods sold in inter-State commerce.

United States, A Typical Federal Structure.

Among the federal strucures of the world, the United States federal structure remains even to-day the most typical. It is in the United States that each of the units of the Union within its own sphere is not only as powerful as the other but also as the Union itself.

Dual Federalism of the U.S.

The division of powers between the Centre and the States under the U. S. Constitution implying the idea of a two mutually exclusive at the same time reciprocally limiting areas of power, the one meeting the other on terms of equality is what is known as the doctrine of dual federalism. If each confines itself in its own area of power, its acts will be valid. Power reserved to the States requires to be guarded and maintained if they are not to be consumed by the Centre particularly in these days of growing centralization. The line of demarcation between Central and State Authority has not been marked with any degree of precision by the Constitution itself. The Centre has named powers and the State retains the remaining powers. In particular instances like the power to declare war, it is the Centre alone that has the exelusive power to act in the matter. In other cases like the power of the Congress to regulate commerce among the several States, the grant of power to the Centre does not prevent the State having concurrent authority over this field and this is so because only in cases where the power of the Congress is made exclusive or in cases where the power is denied to the States by the Constitution or it is incompatible for the State to exercise the power in the field that a State is excluded. If over a field the Centre and the State regulatory powers can extend, the doctrine of dual federalism requires the drawing of the dividing line between the federal jurisdiction and exclusive State jurisdiction. The drawing of this line has re-

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2. (1935) 294 U.S. 511.
3. (1941) 314 U.S. 160.
4. (1910) 217 U.S. 91.

mained a judicial function in the United States though in the other Constitutions such as those of Canada, Australia and India, these lines have been drawn to the extent possible by the Constitutions themselves. It is because in the United States the Constitution itself has not drawn the line, the task has devolved on the judiciary. Until the Civil War in the United States the Supreme Court was anxious to uphold strictly the doctrine of dual federalism so as to maintain equal balance between the Centre and States, each having ascertained for it, its own area of powers. The Civil War put an end to extreme pretensions of State rights.

In the words of Lord Bryce, the United States is a federation of Commonwealths each of which has its own constitution. The National Constitution defines the powers of its processes and recognises the powers of the State resulting in the position that each State has framed its own Constitution defining the powers of its own processes. The National Constitution is the Supreme Law of the land and is also so recognised. The logic of this supremacy is that when a congressional law on the one side and a State Constitution or its laws on the other, conflict, the former prevails over the latter and whether there is such a conflict is a question for decision by the Supreme Court. The Supreme Court fills the role of an arbiter on the federal system.

It is the exclusive power of Congress to regulate commerce among the several States. But States have often attempted to interfere with the free flow of this commerce either by the exercise of their powers to impose taxes on or to regulate inter-State commerce. The Court has always taken care to see that National Commerce is free from discriminatory and retaliatory burdens imposed by the States. Typical of the cases which have preserved inter-State commerce from State obstruction are *Southern Pacific Co.* v. *Arizona*[5] and *Margan* v. *Virginia*[6]. In the former case a law limiting railway train's length was struck down as it imposed serious burden on inter-State commerce carried on by the appellant and in the latter case a Virginia statute which required a motor vehicle involved in inter-State commerce to separate the white and the coloured passengers during its travel in the State was struck down and it was pointed out that an inter-State carrier cannot be subjected to, in the picturesque phraseology of Frankfurter, J., a "crazy-quilt of State laws".

Even this typical federal structure which accepts the principal of dual federalizm has not withstood certain forces that are constantly at work in modern times with the result that the States as against the Union are losing more and more of their powers.

Growing Centralisation.

In other words the current trend of more and more of centralisation is equally true of a typical federal structure such as the United States and as against this the States are certainly powerless. This is inevitable; if any nation, whatever be its constitutional structure, federal or otherwise, is to face and solve successfully the problems of war or constant threats of war, economic crisis, the welfare state concept, the development of modern weapons of war and so on and so forth. Still, it is necessary to remember what Frankfurter, J., has said of the future of the Federal system in the United States in *Polish Alliance* v. *Labour Board*[7], referred to by Edward S. Corwin in *The Constitution of the United States of America* (Analysis and Interpretation) (1952).

"The interpenetrations of modern society have not wiped out State lines. It is not for us (the Court) to make inroads upon our federal system either by indifference to its maintenance or by excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity".

5. (1945) 325 U.S. 761.
6. (1946) 328 U.S. 373.
7. (1944) 322 U.S. 643 (650).

I submit that this observation of this eminent Judge deserves careful consideration by persons in authority in all federal and *quasi* federal systems of the Anglo-American type which includes naturally the Indian Constitutional system as well.

THE MANDATE OF THE U. S. CONSTITUTION.

The United States of America, is a Union of autonomous States for certain common ends, in which there is a division of legislative powers between the Central Government and the Governments of the States, the former being a Government of named powers and latter of residuary powers. Each of these Governments is supreme in its own area. In a case of conflict between the Centre and the State in respect of a matter falling within the central sphere, the central power remains supreme. Dual citizenship is accepted by the United States Constitution. In addition Article VI, Clause (2) known as the Supremacy clause of this Constitution states :

" This Constitution and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land ; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

VIEWS OF MARSHALL, C.J. AND TANEY, C.J.

This clause, as pointed out by Corwin, was the very keystone of the jurisprudence of Marshall, C.J., and it was the view of this eminent Chief Justice that this clause was intended to be applied literally. According to this view if an "unforced reading" of the powers of the Congress gave it the power to enact a law, the fact that the law " projected " national powers " into a hitherto accustomed field of State power with unavoidable curtailment of the latter was a matter of indifference". The opposite was the view taken by Taney, C.J., who relied on X Amendment —" The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people ". Resting on this clause it was sometimes felt that the reserved powers of the States are limitations on national power. Marshall, C.J., as Corwin points out viewed the Supreme Court as part of the National Government and of its supremacy but Taney, C.J., regarded the Supreme Court as outside and above the National Government and the State Governments and possessed of a *quasi*-arbitral function between the two equals that the Centre and the State are. It was really Taney, C.J., rather than Marshall, C.J., that developed the idea of Dual Federalism. Marshall's federalism is described as National Federalism. It is the authoritative view that the issue between the Franklin D. Roosevelt Administration and the Supreme Court was whether Marshall's or Taneys' federalism was to prevail.

WHAT THE COMMERCE CLAUSE HAS DONE.

The issue specifically in these cases has been whether the power of the Congress to regulate commerce must stop short of regulating the employer-employee relationship in industrial production hitherto regulated by the States. In the Fair Labour Standards Act, 1938, inter-State commerce in goods produced by sub-standard labour is not only prohibited but conditions are imposed and penalties prescribed for breaches of the law in the production of goods involved in inter-State commerce and the validity of this statute was sustained in the *United States* v. *Darby*[8], and this ruling is rested on really the view of Marshall, C.J., in *McCulloch* v. *Maryland*[9], and *Gibbons* v. *Ogden*[10], and this is really the end of Dual Federalism leading to aggrandisement of national power. It is rightly pointed out that between Marshall, C.J., and Stone, C.J., the conception of federal relationship was a competitive one imply-

8. (1941) 312 U.S. 100.
9. (1819) 4 Wheat 316.
10. (1824) 9 Wheat 1.

ing rivalry between the National Government and the State Government. But even during this period a different tendency was there as a result of the Civil War represented by the opinion of Bradley, J., in the *Siebold Case*[11], and the oft quoted opinion of McKenna, J., in *Hoke* v. *U.S.*[12].

Co-operative Federalism.

"Our dual form of Government has its perplexities State and Nation having different spheres of jurisdiction but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised; whether independently or concurrently, to promote the general welfare, material and moral".

This is what is known, as Corwin says, as the Co-operative conception of the federal relationship, the States and the National Government being regarded as mutually complementary parts of a single Governmental system all of whose powers are intended to realise the current purposes of Government according to their applicability to the problem on hand. It is on this conception that it is said that recent social and economic legislations rest. This conception pervades congressional legislation making crimes against the States such as theft, racketeering, kidnapping and crimes against the national Government whenever the culprit extends his activities beyond the State boundary—the decision in *Hoke* v. *U.S.*[12] is itself justification for such legislation. Co-operative federalism as Corwin points out invites aggrandisement of national power and it is inevitable that when two co-operate "it is the stronger member of the combination who usually calls the tunes". Relying on *Oklahoma* v. *Civil Service Commission*[13], Corwin says that resting as it does primarily on the superior fiscal resources of the national Government co-operative federalism has been at least to-day a short expression for a constantly increasing concentration of power at Washington in the stimulation and supervision of local policies.

Foreign Relations.

In the field of foreign relations, the doctrine of enumerated powers of the National Government had always a difficult time and in the present day this doctrine "may be unqualifiedly asserted to be defunct". The position has been laid down by Sutherland, J., in *U.S.* v. *Curtis Right Corporation*[14]. The learned Judge points out that a political society cannot last long without a supreme will somewhere and goes on to add

"Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the Colonies ceased, it immediately passed to the Union............it results that the investment of the federal Government with powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution, would have vested in the federal Government as a necessary concomitant of nationality". In the field of international relationship, it is not so much a complexus of particular enumerated powers, as stated by Corwin, as an inherent power, one which is attributable to a national Government on the ground solely of its belonging to the American people as a sovereign political entity at international law and in that field, the principle of federalism no longer holds, if it ever did. I may add that the states do not come in at all in the field of international relationship, and, therefore, the state erecting a barrier against the Union in this field does not arise. What is true of the American federal structure in this regard is true of all other federal and *quasi* federal struc-

11. (1830) 100 U.S. 371.
12. (1913) 227 U.S. 308.
13. (1947) 330 U.S. 127.
14. (1936) 299 U.S. 304.

tures in the Anglo-American countries, which include India. The relevant provisions of the Constitutions of other federal and *quasi* federal structures more than emphasise the view expressed by Sutherland, J., in this respect.

Balance between the State and Centre.

Most of the cases that have come up for decision by the Supreme Court of the United States involved generally the problem of the maintenance of the balance between the States on the one side and the Federal Government on the other and the task of that Court had been rendered more difficult by virtue of the fact that the United States Constitution is vague and ambiguous in this regard. Since the Civil War, which threatened to end the United States constitutional system, but saved by the statesmenship of President Abraham Lincoln, there has been a rapid growth of centralisation and the Supreme Court has in a large measure facilitated the growth of the national power involving more and more of loss of powers and loss of prestige for the State Governments. Successive revolutions in the economic, industrial, transport and communications fields have in a large measure contributed to the growing concentration of power in the Centre. The sources of revenue are more and more absorbed by the national Government resulting in a situation that the States have become more and more dependent on the nation—a trend that is common to all federal system the world over.

Why the inter-State Commerce Clause.

Prior to the Constitution, inter-State commerce suffered a severe set back as a result of the States discriminating against each other adopting many devices, particularly in the shape of tariffs, taxes and regulations. This serious obstacle to inter-State commerce had to be overcome and the federal compact embodied in Article 1, section (8), clause (2) is that Congress shall have the power to regulate commerce ......among the several states........ In other words the power to regulate inter-State commerce belongs to Congress alone. It is the mandate of X Amendment of the United States Constitution that the powers that are not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively and to the people. In asmuchas doubts arose on the basic principle that the federal Government is a Government of enumerated powers limited to the area of authority delegated to it by the Constitution and the States are Governments of residual powers, X Amendment was put into the Constitution within two years of its commencement. The powers, therefore, to regulate intra-State Commerce belongs to the state involved. The question arises what is the dividing line between inter-State commerce and intra-State commerce. The dividing line or barrier has not remained constant. Successive formulae have been adopted to mark off the dividing line and it is interesting history to see how the line has shifted from time to time and has come back to the opinion of Marshall, C.J., who for the first time indicated the dividing line between intra-State commerce and inter-State commerce in his famous opinion in *Gibbons* v. *Ogden*[15].

In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*[16] Frankfurter, J., remarks that " it is easy to mock or minimise the significance of free trade among the States " which is the significance given to the commerce clause by a century and a half of adjudication by the Supreme Court " with all doubts as to what lessons history teaches, few seem clearer than the beneficial consequences which have flowed from this conception of the commerce clause ". Thus conceived the task of Congress and the Supreme Court has been to protect in the national commercial interest inter-State commerce against State barriers.

Congress in the exercise of its power to regulate commerce among the several States, with foreign nations and with the Indian tribes has in course of time obtained general control over business in the country. Foreign and inter-State commerce

15. (1824) 9 Wheat 1.
16. (1951) 341 U.S. 329.

form the bulk of commerce of the United States. The Congress, apart from enacting laws regulating navigation, transportation by land and air, the telegraph, telephones and the radio, has erected the inter-State commerce commission under the Inter-State Commerce Act and invested that body with far reaching powers—to the detriment of the State powers. The entire economy of the country is under national control a situation far removed from the original objective of the framers of the Constitution that the national economy was to follow generally the restrictive powers of the State over it.

Commerce Clause—A Source of Power.

In peace time the commerce clause of the United States Constitution, barring XIV Amendment, is the most fertile source of power of the National Government and effective limitation on the powers of the States. A narrow definition of *commerce* as buying and selling or trade was rejected by Marshall, C.J., in *Gibbons* v. *Ogden*[17]. It is in the wide definition of commerce as given by Marshall, C.J., that the foundation of the interpretation of this very important clause of that Constitution was laid. " Commerce " it was pointed out by Marshall, C.J., " undoubtedly is traffic, but it is something more—it is intercourse in the sense of commercial intercourse.

Corwin points out that " to-day *commerce* in the sense of the Constitution and hence *inter-state commerce* when it is carried on across State lines, covers every species of movement of persons and things, whether for profit or not ; every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise, every species of commercial negotiation, which as shown by the established course of the business will involve sooner or later an act of transportation of persons and things, or flow of services or power across state lines" (*Gibbons* v. *Ogden*[17] ; *Pennsylvania Wheeling and Belmot Bridge Co.*[18] ; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*[19] and *Surft & Co.* v. *U. S.*[20], relied on).

What are not inter-State commerce—Not clear.

It has been held that mining or manufacturing with the intent that the product shall be transported to other States (*Kidd* v. *Pearson*[21] and *Oliver Iron Companys* v. *Lord*[22]) ; Insurance transactions carried on across state lines (*Paul* v. *Virginia*[23]), exhibitions of base ball between professional teams travelling from State to State (*Feebral Base Ball Club* v. *National League*[24]), the making of contracts for insertion of advertisements in periodicals in another State (*Blumenstock Bros.* v. *Curtis Pub. Co.*[25]), and contracts for personal services to be rendered in another State (*Willams* v. *Fears*[1]), have all been held not inter-State commerce but as Corwin points out that some of the recent decisions have either overruled these holdings or cast doubts on most of them. In *Associated Press* v. *United States*[2], the collection of news by a press association and its transmission to client newspapers has been held inter-State commerce. In *United States* v. *South Eastern Underwriters Association*[3], it has been held that the business of insurance transacted between an insurer and insured in different States is inter-State commerce. In this the inter-State character of insurance business as organised to-day is referred to. The commerce clause is generally a limitation on the power of the States. As a source of national power it is read in association with the power of the Congress. Article 1, section 8, Clause (18) of the

17. (1824) 9 Wheat 1.
18. (1856) 18 How. 421.
19. (1878) 96 U.S. 1.
20. (1905) 196 U.S. 375.
21. (1888) 128 U.S. 1.
22. (1923) 262 U.S. 172.
23. (1869) 8 Wall 168.
24. (1922) 259 U.S. 200.
25. (1920) 252 U.S. 436.
1. (1900) 179 U.S. 270.
2. (1945) 326 U.S. 1.
3. (1944) 322 U.S. 533.

United States Constitution states that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof. The commerce clause as a source of national power read along with Article 1, section 8, Clause (18) has produced in recent times, as pointed out by Corwin, that inter-State commerce connotes operations which precede and operations which follow commercial intercourse itself, provided such operations are deemed by the Court to be capable of affecting such intercourse.

Referring to the power of the Congress to regulate inter-State commerces Corwin comments that "This protective power has moreover two dimensions. In the first place it includes the power to reach and remove every conceivable obstacle to or restrictions upon inter-State and foreign commerce from whatever source arising whether it results from unfavourable conditions within the States or from State legislative policy like the monopoly involved in *Gibbons* v. *Ogden*[4], or from both combined. In the second place, it extends—as thus also the power to restrain commerce—to the instruments and agents by which commerce is carried on ; nor are such instruments and agents confined to those which were known or in use when the Constitution was adopted". In this context, *Mondou* v. *New York N. H. & H. R., Co.*[5], known as the "Second Employers Liability cases" has been relied upon.

WHAT CONTROL OVER COMMERCE MEANS ?

The opinion of Marshall, C.J., in *Gibbons* v. *Ogden*[4], that the power of the Congress to regulate inter-State commerce necessarily implied the power to control the agents and instrumentalities of commerce as they grew and also changed from time to time found "its classic expression in the opinion of Waite, C.J., in *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*[6], which runs as follows :

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to steamboat, from the coach and steamboat to the railroad and from the railroad to the telegraph,as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty, of the Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State Legislation". It was because of such holding that the Radio Act of 1927 whereby all forms of inter-State and foreign raido transmissions within the United States, its territories and possessions were brought under national control.

Congressional regulation of Waterways, Hydraulic power land transportation particularly railroads was upheld in terms of the power of Congress to regulate commerce among the several States.

ROOSEVELT ADMINISTRATION PROBLEMS.

Immediately after Franklin D Roosevelt became the President of the United States the problem that faced the new administration was put by Hughes, C.J., in *Appalachian Coals, Inc.* v. *United States*[7], "when industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities depended

4. (1824) 9 Wheat 1.
5. (1912) 223 U.S. 1.
6. (1878) 96 U.S. 1.
7. (1933) 288 U.S. 344 at 372.

upon profitable production are prostrated, the wells of commerce go dry", and this was exactly the situation Congress attempted to deal with in passing the National Industrial Recovery Act, 1933 and the opening provision of the Statute refers to the existence of national emergency productive of widespread unemployment and disorganisation of industry which burdened inter-State and foreign commerce, affected the public welfare and undermined the standards of living of the American people. And ample powers were put into the hands of the President to deal with the situation by framing appropriate codes. No doubt many of these codes and other statutes meant to rehabilitate the economy of the nation were held invalid by the Supreme Court but soon the Constitution of the Supreme Court so changed that many of the steps taken at the instance of the Roosevelt administration were upheld as valid.

"The question whether Congress's power to regulate commerce among the several States embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favour of congressional power is an event of first importance for the future of Amercian Federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the spectre of an Act of Congress forbidding inter-State slave trade. (*Grouse* v. *Slaughter*[8]). The debate was concluded 99 years later by the decision in *United States* v. *Darby*[9], in which the Fair Labour Standard Act was sustained" says Corwin.

Commerce Power and other Powers.

The United States Constitution representing a federal compact among the thirteen original colonies that merged into the American Union, named the legislative powers of Congress leaving the residue of legislative powers to the States and in respect of certain powers vested in Congress such as (1) the power to levy customs duties (2) the power to raise armies, etc., there are limitations put on the power of the States to make laws—in other words the extent of the State barrier against these preserves of the congressional power has been fixed by the Constitution itself. But as regards the power of Congress to regulate commerce among the several States correlative restrictions have not been put on the power of the States. Hamilton points out in the "Federalist" that while some of the powers vested in the Centre admit of their concurrent exercise by the States, others by their very nature are exclusive and, therefore, do not admit of a like power in the States contradictory and repugnant. Hamilton gives the example of the power of Congress to pass Uniform Naturalisation Law as an exclusive power belonging to it.

The Doctrinal Background of the Commerce Clause.

Daniel Webster in the course of his argument in *Gibbons* v. *Ogden*[10], dealt with the principle which should guide the Court in adjusting the powers of the State to unexercised powers of Congress under the commerce clause and also the problem arising when Congress has exercised its power. In the course of the judgment, it is pointed out that the learned counsel contended "that the people intended in establishing the Constitution, those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive ; that is, the higher branches of commercial regulations must be exclusively committed to a single hand. What is it that is to be regulated ? Not the commerce of the several States, respectively but the commerce of the U.S. Henceforth, the commerce of the States was to be a unit ; and the system by which it was to exist and be governed, must necessarily be complete, entire and uniform ". At the same time Webster conceded " that the words used in the Constitution to regulate commerce are so very general and extensive, that they might be construed to cover a vast field of legislation,

8. (1841) 15 Eet 469.
9. (1941) 312 U.S. 100.
10. (1824) 9 Wheat 1.

part of which has always been occupied by State laws ; and therefore, the words must have a reasonable construction, and the powers should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires ".

When Congress exercises its power the result according to Webster is that the act of Congress must be treated as a unit so that when Congress had left subject matter within its jurisdiction unregulated, it must be deemed to have done so of design, and its omissions or silences accordingly be left undisturbed by State actions. Corwin points out that Marshall, C.J., was in sympathy with this argument of Daniel Webster though the learned Chief Justice did not feel obliged to deal with the theories put forward by the Counsel.

NATURE OF THE POWERS OF THE CONGRESS OVER INTER-STATE COMMERCE.

Gibbons v. *Ogden*[11], is itself authority for the rule that the power of Congress to regulate commerce among the several States is exclusive and this power admits of no other limitations except those imposed by the Constitution itself. Congress can take all steps to remove all unreasonable, undue and unjust obstructions in whatever form against inter-State commerce resulting from State regulation or by the acts of carriers.

The dividing line between the national power and the State power in the field of inter-State commerce has not been drawn definitely so far nor is it likely to be done in future. At the same time the principle that this power of Congress is exclusive remains firm, if a subject of inter-State commerce is national in character, it admits of only one kind of regulation. It is the national market that is involved in inter-State commerce and can, therefore, be subject to one system of regulations only and not to a multiple system of regulation.

In *Robbins* v. *Shelby Country Taxing District*[12], an early decision of the Supreme Court, the view was expressed if Congress had not made regulations in respect of a subject of inter-State commerce, all that such a situation meant was that the subject should be free from any regulation and not that this field was open to State regulation. In *Cloverleaf Butter Co.* v. *Patterson*[13], it has been held that in a case of partial exercise of power by Congress, the State may legislate on those phases left unregulated by Congress when such legislation is of local concern.

The question naturally arises, what is really the extent of control that the States possess over inter-State commerce. The position appears clear that the States have no direct control over inter-State commerce but the States do have indirect control over it by law in enforcement of their police power and their jurisdiction over persons and property in their respective limits. What is police power ? State Laws that seek to protect the general public welfare are legitimate exercise of police powers of the States. Laws which protect life, health, morals, comfort and property of the people of the State, Laws which establish and regulate highways, canals, ports and such other commercial facilities are all examples. It is by these local protection laws that the States may seek to control indirectly inter-State commerce. The police power of the State is undoubtedly small barrier on inter-State commerce and inter-State commerce does not admit of any other restriction apart from the restrictions actually imposed by the Constitution. The seven freedoms, among which the right of the citizen to carry on........any trade or business is also one, under the Indian Constitution, are subject to reasonable restrictions imposed by the law of the State either in public interest or general public interest. These reasonable restrictions that can be imposed by law under the Indian Constitution are what are known as the police powers of the State under the United States Constitution.

11. (1824) Wheat 1.
12. (1887) 120 U.S. 489.
13. (1942) 315 U.S. 148.

Robbins v. *Shelby Country Taxing District*,[14] cited above is authority for the principle that the State which has the power to make internal regulations cannot through such regulations impose tax on persons passing through or coming in for temporary purposes in connection with inter-State or foreign commerce, nor can impose a tax on imports from abroad or from another State that has not yet become part of the common mass of the property of the State, nor discriminate against persons and property of other States.

In the exercise of the regulatory power of Congress over inter-State commerce: (1) The Inter-State Commerce Act that erected the Inter-State Commerce Commission, (2) The Sherman Anti-Trust Act of 1890, (3) The Clayton Act of 1914, (4) The Federal Trade Commission Act of 1914, (5) The Packers and Stockyards Act of 1921, (6) The U.S. Cotton Futures Act of 1916, (7) The Grain Futures Act of 1922, (8) The Federal Trade Commission Act of 1938 and (9) The Transportation Act of 1940 were enacted to maintain the free flow of commerce among the States and preserve intact the right of the citizen to carry on any trade or business unimpeded by combinations, contracts and monopolies.

The Federal Commissions Act, the Radio Act, The Securities Act, The Federal Power Act, the National Labour Relations Act, The U. S. Tariff Commission Act, The Federal Food Drug and Cosmetics Act and Federal Highways Act; are all examples of the implementation of the commerce power that belongs to Congress.

The Supreme Court also in its turn since its famous decision in *Gibbons* v. *Ogden*[15], has constantly extended and enlarged this power of Congress. It has been pointed out, that this very wide power of Congress can govern not only external commerce but reach inside the State in order to protect the products of other States and countries from discrimination, in *Guy* v. *Baltimore*[16].

In spite of the wide extent of power that Congress can legitimately exercise in regulating commerce among the several States, it must be recognised as Hughes, C.J., has pointed out in *Schechter Poultry Corporation* v. *U. S.* [17], that the Federal authority may not be pushed to such an extreme as to destroy the distinction which the commerce clause itself draws between commerce among the several States and internal concerns of the States.

The line of division between inter-state commerce and intra-State commerce has yet to become firm. Successive formulae have been adopted by the Supreme Court in the light of the circumstances obtaining at the time of the decision in question. That there is a line of division is accepted but where it is, is a matter for search in individual cases coming up for decision. The resolution of an issue whether a transaction is inter-State commerce or not depends on the essential character of the commerce involved in the transaction. The recognised tests are usually through billing, continuous possession by the carrier, uninterrupted movement, unbroken bulk and the intention at the start of the movement and so on.

The vital question has always been when the Federal power commences and when it ends. It is on the answer to this question depends the right of the State to collect property tax, licence and privilege tax, sales and use tax.

In adopting successive formulae to locate the dividing line between inter-State commerce and intra-State commerce the reflection of Hughes, J., in *Simpron* v. *Shepard*[18], is appropriate. The learned Judge said that the American system of Government is a practical adjustment by which national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. The successive formulae represent no more than an effort to effect a practical adjustment between the two great interests, the maintenance of freedom

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14. (1887) 120 U.S. 489.
15. (1824) 9 Wheat 1.
16. (1880) 100 U.S. 434.
17. (1935) 295 U.S. 495.
18. (1913) 230 U.S. 352.

of commerce except as far as Congress may choose to restrain it, and the maintenance in the States of local Governments (as pointed by Corwin). In this area of judicial review the Court really fills the role of a *quasi* legislative body. In *South Carolina State Highway Department* v. *Barnwell Bros.*,[19] Stone, C.J., lays considerable stress on the balancing and adjusting role of the Court in the application of the commerce clause in relation to the State power.

It is only with reference to inter-State commerce, because it is conducted inside the country by persons and Corporations generally engaged in local business that the balancing and adjusting of the power of the national Government and the State Government get difficult. As a broad proposition if a transaction that is local is unconnected with inter-State commerce it falls within the police and taxation power of the State. It is this aspect that has given rise to a great deal of confusion. In *Freeman* v. *Hewit*,[20] Frankfurter, J., said,

"The power of the States to tax and the limitations upon that power imposed by the commerce clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a Federal Government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the Central Government and constituent States. The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonise all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinion must be read in the setting of the particular cases and as the product of pre-occupation with their special facts".

In spite of the difficulty involved in harmonising the precedents of the Supreme Court on the subject, it will be useful to notice a few at least of the formulae evolved by the Court.

Dealing sith the States power to tax foreign commerce in *Brown* v. *Maryland*[21], Marshall, C.J., striking down a Maryland law requiring all importers of foreign articles preparatory to selling the same to take out a licence as invalid, laid down the now famous original package doctrine and under this doctrine, the taxing power of the State does not extend in any form to imports from abroad so long as they remain the property of the importer in his warehouse in the original form or package in which they were imported. But if the importer parted with his imports or otherwise mixed them up with the general property of the State by breaking up the packages, they would form part of the general property of the State attracting the State taxing power. It was also pointed out even as original packages the imports were subject to the police measures of the State adopted in good faith for the protection of the public against dangers.

On the question whether a State law amounted to regulation of commerce, foreign or inter-State, Marshall, C.J,. pointed out that it is more the substance than the form of the law that mattered. Though Marshall, C.J., himself did not conceive of this original package doctrine as of universal application but only as a stopgap principle, this doctrine has become universal in its application to foreign commerce, though rejected in its application to inter-State commerce. It was in *Woodruff* v. *Parham*[22], the attempt to persuade the Court to accept the original package doctrine in its application to inter-State commerce failed chiefly on the ground that the doctrine was *obiter dictum* of Marshall, C.J., with reference to inter-State commerce. It is the considered opinion of Corwin who points out that taxation is one thing, prohibition another adding that, "in the field of the police power, where its applicability was not so much as suggested in *Brown* v. *Maryland*[21] the original package doctrine has been frequently invoked by the Court against State legislation, and even to-day, perhaps retains a spark of life."

19. (1938) 303 U.S.177.
20. (1946) 329 U.S. 249.
21. (1827) 12 Wheat 419.
22. (1869) 8 Wall 123.

What is inter-State commerce, according to Robert E. Cushman, remains a troublesome question. In *Paul* v. *Virginia*[23], it was held that the business of insurance is not intere-State commerce. The insurance company doing business across State lines unsuccessfully tried to escape State control on the ground that it was engaged in inter-State commerce. But in *U. S.* v. *South Bastern Underwriters Association*[24], some 200 fire insurance companies were prosecuted under the Sherman Act for monopolistic practices on the ground that the insurance business as carried on by these companies comprised elements which are inter-State commerce and the business, therefore, is subject to federal control as inter-State commerce. Cushman says again that the efforts of the States to ward off unwelcome competition moving against them across State lines did not end with *Gibbons* v. *Ogden*[25], and refers to *Baldwin* v. *Seelig*[25-a], in which the New York State had fixed the price at which milk could be bought and sold inside the State. Seelig was purchasing milk in Vermont at lesser price than the price ruling in New York and selling it in New York and this was sought to be prevented. It was held that the State could not restrict inter-State commerce in milk for escaping the competition of cheaper milk brought in from outside the State. It was held in *H. P. Hood & Sons.* v. *DuMond*[1], that the State may not for the purpose of protecting local business in milk supply from competition, restrict shipment of milk out of the State.

United States v. *Darby*[2], which overrules *Hammer* v. *Dagenhart*[3], is a landmark decision in the sense that the Federal Government too like the State Government can exercise necessary police power hitherto recognised as not belonging to it in full measure, though its position as guardian of the commerce clause has been recognised beyond any manner of doubt. The crucial question was whether Congress had the power to prohibit inter-State commerce shipment of lumber produced under sub-standard labour conditions in a State. Such production was prohibited by the Fair Labour Standards Act. It was realised that inter-State commerce could be used to cause public injury and, therefore, it is not only the right of Congress but also its duty to prevent anyone using inter-State commerce to cause public harm. The ruling in this case is the climax of a move that started years ago in vesting the Federal Government with Police powers that it did not possess before—which was vested in the State alone by X Amendment of the Constitution. Police power is the general power that belongs to the State to pass general welfare laws for the protection of health, morals, safety, good order, etc., of the community in its charge. The social objectives achieved in the exercise of the police power of the State are attained by Federal control also through the use of the powers granted to Congress under the Constitution.

Congress does not have the power to forbid production of impure food in a State but the shipment of such food in inter-State commerce can be forbidden by it. Local business swindler may not come within the control of Congress but Congress can prevent the use of the mails to perpetrate frauds. The effective control over the postal system has been obtained by Congress in the exercise of its power to regulate commerce among the several States. It is by effective exercise of this indirect control that Congress has come to have over an increasing number of social and economic problems at both the levels—State and Federal. The growing federal police power starts from the commerce clause of the Constitution that has to control commerce on a scale and proportion not even imagined by the makers of the Constitution. The commerce that the makers of the Constitution were familiar with, was agricultural commerce among the thirteen original colonies and little could they have imagined that the complexion of the commerce they knew would be changed so

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23. (1869) 8 Wall 168.
24. (1944) 322 U.S. 533.
25. (1824) 9 Wheat 1.
25-a. (1935) 294 U.S. 511.
1. (1949) 336 U.S. 525.
2. (1941) 312 U.S. 100.
3. (1918) 247 U.S. 251.

much in the course of less than two centuries by the economic, industrial, transport and communications revolutions that have overtaken it. All the same with the existing power the consequences produced by the new situation had to be faced and has been faced successfully by Congress.

The penetration of this new federal power has been resisted by the States but without any appreciable measure of success. Many new federal social laws have been sustained by the Supreme Court, *e.g.*, Federal Safety Appliances Act, Transportation of Explosives Act, Laws imposing restrictions on the number of hours of work of trainmen and telegraphers, etc. Though these are in pith and substance social and economic laws, they have been sustained on the ground that they have tended to keep inter-State commerce safe, efficient and unobstructed. Power to regulate has been held to mean power to protect inter-State commerce and promote its efficiency in *B. & O. R. Co.* v. *Inter-State Commerce Commission*[4].

In *Champion* v. *Ames*[5], known as the Lottery case it was held that Congress can validly bar from inter-State commerce commodities which are dangerous or otherwise objectionable. It was held that Congress had the power to protect the people of the United States from the pestilence of lotteries from the channels of inter-State commerce. This power of Congress has been extended to ban impure or misbranded food and drugs, meat not properly inspected, obscene literature and other injurious things. There is a law of Congress which prohibits the shipment of bulls in inter-State commerce for bull fighting. The wide powers that Congress has over the postal system has facilitated in a large measure the growth of federal police power. Mr. Cushman rightly takes the view that there is no difference in principle between barring objectionable articles from inter-State commerce and forbidding the use of the facilities of inter-State commerce to aid immoral or criminal activities. *Hoke* v. *U. S.*[6], upheld a law that made it a crime to transport women across a State line for immoral purposes. This statute was not directed against localised vice but against organised gangs of white slaves who carried on inter-State traffic in girls and women on which depended commercialised prostitution. In the year 1925 Congress made it a crime to drive knowingly a stolen automobile across a State line and a recent law puts a ban on shipment of stolen goods in general in inter-State commerce. The Lindberg Act upheld in *Gooch* v. *U. S.*[7], makes it a crime to carry a kidnapped person across a State line and the law now is that the use of mails, telegraph, telephones or any other inter-State communication for extortion or blackmail is a federal crime.

The federal police power was pushed further in the passing of the Child Labour Act, 1916 and this law forbade products of child labour in inter-State commerce and on the validity of this enactment, the Supreme Court was divided five against four in *Hammer* v. *Daghihart*[8]. The majority opinion was that such goods were harmless and the object of the law was not to regulate inter-State commerce but to regulate the conditions under which the goods entering that commerce was produced and, therefore, the law was not a *bona fide* exercise of commerce power. The majority Court rejected the argument in support of the law that Congress had the power to prevent production under unsatisfactory labour conditions in a State in order to prevent such product competing in inter-State commerce with similar product produced under fair labour conditions, thus producing unfair competition. The local laws may give advantages over others but the commerce clause does not give the authority to equalise those conditions was the view taken by the Court. The law was held bad under X Amendment also. Holmes, J., dissenting held the opinion that the law was a clear and direct exercise of commerce power by Congress

4. (1911) 211 U.S. 612.
5. (1903) 188 U.S. 321.
6. (1913) 227 U.S. 308.
7. (1936) 297 U.S. 124.
8. (1918) 247 U.S. 251.

Twenty-three years later this case was overruled in *U. S.* v. *Darby*[9], and the opinion of Holmes, J., holds the field.

WHITHER DUAL FEDERALISM?

The U. S. Constitution as it has been time and again pointed out is a compact between the many sovereignties that went into a federal structure and this is the very base of that Constitution which accepts a division of powers between the Centre and the States on the footing that the fields of power of the two Governments are mutually exclusive and reciprocally limiting. This dual federalism according to the text of the Constitution finds its fulfilment in the commerce clause of the Constitution. The grant of power to Congress to regulate commerce among the several States, is not accompanied as it has been pointed out earlier, by any corresponding limitation on the power of the States. Therefore, if at all, the State is to be excluded it can be excluded because the nature of the power granted to Congress demands that a similar power should not exist in the State (Vide: *Cooley* v. *Board Post Wardens*[10]).

The doctrine of dual federalism, that the national and the State Governments are separate and distinct, acting separately and independently of each other, the Centre remaining supreme in respect of the powers granted to it and the States remaining supreme in respect of the powers not granted to the Centre nor prohibited to the States by the terms of the Constitution, has been given its full effect in *Collector* v. *Day*[11]. But this was a decision that was given at a time when the country was really, as pointed out by Corwin, in the throes of reconstruction. There was no occasion to see how far the Civil War amendments of the Constitution had broadened the national power at the expense of the State power. Referring to this decision, it is stated by Corwin that "it never received the same wide applications as did *McCulloch* v. *Maryland*[12], in curbing the power of the States to tax, operations or instrumentalities of the federal Government".

THE GENERAL ISSUE.

The present tendency according to Corwin is that federal legislation under the commerce clause has penetrated more and more deeply into areas once occupied exclusively by the Police power of the State. The Courts' decisions resolving the conflict of State law with the Congressional law operating in a concurrent field over inter-State commerce are classified under three heads :

(1) Those which follow Webster's theory advanced in *Gibbons* v. *Ogden*[13], that when Congress acts upon a particular phase of inter-State commerce, it designs to appropriate the entire field with the result that no room is left for supplementary State action.

(2) Those in which, in the absence of conflict between specific provisions of State and Congressional measures involved the opposite result is reached.

(3) Those in which the State legislation involved is found to conflict with certain acts of Congress and in which the principle of national supremacy is invoked by the Court.

It is pointed out that earlier cases stemming from State legislation affecting inter-State railway transportation fall under the first head and legislation intended to promote public health and fair dealing fall under the second head and the more recent cases are more difficult to classify especially between the first and third heads.

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9. (1941) 312 U.S. 100.
10. (1851) 121 How. 299.
11. (1876) 11 Wall. 113.
12. (1819) 4 Wheat. 316.
13. (1824) 9 Wheat. 1.

It was only in *Hopkins Federal Savings and Loans Association* v. *Cleary*[14], that the attack on federal law that it amounted to serious interference with the power of the State to control the entities created by it, was sustained on the ground that the federal law was a violation of Tenth Amendment. But in *Northern Securities Co.* v. *U.S.*[15] a case decided at the start of the century that Tenth Amendment was no barrier to the application of Sherman Anti-Trust Law to prevent one corporation from restraining commerce by means of stock ownership in two competing corporations. It is observed in this case, "no State can, by merely creating a corporation, or in any other mode, project its authority into other States and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over inter-State and international commerce, or so as to exempt its corporation engaged in inter-State commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any State may give a corporation created under its laws, authority to restrain inter-State or international commerce against the will of the nation as lawfully expressed by Congress. *Every Corporation created by a State is necessarily subject to the supreme law of the land* (italics mine). To-day Tenth Amendment does not avail the States or their political sub-divisions from the impact of authority positively granted to the Federal Government by the Constitution. The position thus set out stems from the comparatively recent decision in *U. S.* v. *Darby*[16], which clearly held that Tenth Amendment imposed no limitation on the Federal Government in the exercise of its delegated powers under the Constitution. This decision again marks the end of the doctrine of dual federalism also.

The View of Jackson, J.

Jackson, J., in his Godkin lecture at the Harvard Graduate School of Public Administration, dealing with the federal and States' power under the U. S. Constitution, has this observation to make: "It is the maintenance of the constitutional equilibrium between the States and Federal Government that has brought the most vexatious question to the Supreme Court. That it was the duty of the Court, within its own constitutional function, to preserve this balance has been asserted by the Court many times ; that the Constitution is vague and ambiguous on this subject is shown by the history preceding our civil war. It is undeniable that evern since that war ended we have been in a cycle of rapid centralisation, and Court opinions have sanctioned a considerable concentration of power in the Federal Government with a corresponding diminution in the authority and prestige of State Governments. Indeed, long ago an astute foreign observer (Dicey) declared the U.S. to be " a nation concealed under the form of a federation ", as respected an authority as Charles Evans Hughes declared nearly three decades ago that "far more important to the development of the country than the decision holding Acts of Congress to be invalid, have been those in which the authority of Congress has been sustained and adequate national power to meet the necessities of a growing country has been found to exist within constitutional limitations." This concentration of power is attributed to improved methods of transportation and communication ; the increasing importance of foreign-affairs and of inter-State commerce ; the absorption of revenue sources by the nation with the consequent appeal by distressed localities directly to Washington for relief and work projects, bypassing the State entirely, the direct election of Senators and various other factors—all have contributed to move the centre of gravity from the State capitals to that of the nation.

The Present Position.

The cycle of rapid centralisation is a feature common to all federal and quasi-federal systems of the world. The forces that are at work aiding growing centralisation are common to all the federal systems the world over. As against these

14. (1935) 296 U.S. 315.
15. (1904) 193 U.S. 197.
16. (1940) 312 U.S. 100.

forces at work the power of the States or provinces even in fields common to the Centre and the States may not be of great importance. State barriers will have to be necessarily reduced to the minimum possible, if the Federal Government is to withstand the terrible stress and strain released by the many forces that are at work to-day. This position has been accepted by the Canadian and Indian Constitutions by making appropriate provisions in their respective instruments not leaving the matter to be dealt with by a doctrinal interpretation by the Courts as in the case of the United States Constitution whose provisions are in many vital respects vague and ambiguous.

The Canadian Constitution.

The object of the Canadian Constitution was to devise a scheme by which the best features of the United States Constitution could be grafted, rejecting the bad, on the British Constitution and to vest in the provinces exclusive jurisdiction in all matters of a provincial, local, municipal and domestic character leaving exclusive jurisdiction to the Union or the Centre in all matters of a general national or quasi national character. Lord Watson delivering the judgment of the Judicial Committee of the Privy Council in *Liquidators of the Maritime Bank* v. *Receiver General of N.B.*[17], points out, " The object of the Act was neither to weld the provinces into one, nor to subordinate provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy ". Dealing with the Canadian constitutional system Earl Loreburn, L.C., in *A. G., Ontario* v. *A. G., Canada*[18], points out that in 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. " Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It will be entirely subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion and to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation) general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have and also within the description of what the province is to have. Such apparent overlapping is unavoidable and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute."

In *A. G., Australia* v. *Colonial Sugar Refining Co.*[19], Viscount Haldane, L.C., says that about the fundamental character of the Australian Constitution there can be no doubt. " It is federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shows. The British North America Act of 1867 commences with the preamble that the then provinces had expressed their desire to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom. In a loose sense the word federal may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new constitutions even of the states themselves ". The scheme of distribution of legislative powers is then dealt with and dealing with the general power of the Dominion Parliament under section 91 to make laws for the peace,

17. L R. (1892) A.C. 437.
18. L.R. (1912) A.C. 571.
19. L.R. (1914) A.C. 237.

order and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislature, it is pointed out that the provincial powers were to remain very much restricted. The conclusion is reached that the Canadian Constitution departs widely from the true federal model adopted in the Constitution of the United States Tenth Amendment which declares that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to their people. I referred to this aspect of the Canadian Constitution as shown by Viscount Haldane, L.C., at the very beginning of this Lecture and stated why the Canadian System can be described only as a quasi federal system. (My Article on the *Indian Constitutional Structure* in the Year Book of Legal Studies, Madras, 1957, may be referred to).

In *Bank of Toronto* v. *Lambe*[20], a doctrinnaire interpretation of the British North America Act was rejected. It was pointed out that the Judicial Committee was called upon to construe the express words of an Act of Parliament that the Canadian Constitution is. Dealing with the scope of sections 91 and 92 of the Canadian Constitution Lord Watson in *A. G., Ontario* v. *A. G., Canada*[21], says "These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power, which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would in their Lordships' opinion be not only contrary to the intendment of the Act but would practically destroy the autonomy of the provinces". The rules of construction of the Canadian Constitution are set out in *Re : Regulation and Control of Aeronautics in Canada*[22]:

(1) The legislation of the Parliament of the Dominion so long as it strictly relates to subjects of legislation expressly enumerated in section 91 is of paramount authority even though it trenches upon matters assigned to the Provincial legislatures by section 92.

(2) The general powers of legislation conferred upon the Parliament of the Dominion by section 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in section 92, as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion.

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in section 91.

(4) There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail. On this point *Forbes* v. *A. G. Manitoba*[23] where the issue was whether Dominion and provincial income-tax legislation could co-exist. "The doctrine of the occupied

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20. L.R. (1887) 12 App. Cas. 575.
21. L.R. (1896) A.C. 348.
22. L.R. (1932) A.C. 54.
23. L.R. (1937) A.C. 260.

field applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both. Here there is no conflict. Both income-taxes may co-exist and be enforced without clashing. The Dominion reaps part of the field of the Manitoba citizen's income. The province reaps another part of it ". It is said that despite the absence of constitutional difficulty the existence of common tax fields such as this has induced Dominion provincial co-operation in income-taxation both in the interests of economy of administration and of relieving the tax-payer from making multiple returns. Dominion Provincial Taxation Agreement Act 1942 (Canada) is an example.

Dealing with the residuary character of the general power of the Dominion Parliament, Viscount Haldane, L.C., said in *Great West Saddlery Co.* v. *The King*[24], "It must now be taken as established that section 91 enables the Parliament of Canada to incorporate Companies with such status and powers as to restrict the provinces from interfering with the general right of such companies to carry on their business where they choose, and that the effect of the concluding words of secion 91, is to make the exercise of this capacity of the Dominion Parliament prevail in case of conflict over the exercise by the Provincial legislatures of their capacities under the enumerated heads of section 92. Lord Sankey, L.C. in the *Aeronautics case*[25] viewed aerial navigation as *inter alia* " a class of subject which has attained such dimensions as to affect the body politic of the Dominion ". Same view was applied to *radio communication* by Lord Dunedin. In re : *Regulation and Control of Radio Communication.*[1]

COMMERCE CLAUSE OF CANADA.

The Canadian Dominion Parliament gets the power to regulate trade and commerce. Without qualification and in this sense the grant of power to the Dominion Parliament is in wider terms than the grant of power to Congress of the United States to regulate commerce among the several States. As against this power of the Dominion Parliament the Canadian province is given the exclusive right to legislate on property and civil rights. The Courts have taken the view that the power given to the Dominion Parliament to legislate on trade and commerce ought not to be so interpreted as to conflict with the power of the Provincial Legislature to legislate on property and civil rights and this power of the provincial legislature is a barrier against the uncontrolled exercise of the power of the Dominion Parliament to legislate on trade and commerce. Judicial interpretation that increased the power of the Congress to regulate commerce among the several States has increased the power of the Provincial Legislatures of Canada to legislate on property and civil rights. In re : *Board of Commerce Act, etc.*[2], it is stated that property and civil rights, of course, taken in the most comprehensive sense, is a phrase of very wide application and like the words trade and commerce, it must be restricted by reference to the context and the other provisions of sections 91 and 92.

THE QUESTION POSED BY THE INDIAN CONSTITUTION.

The Indian Constitution is much nearer the Canadian Constitution than any other Constitution of the world, though it has also drawn largely on many other leading Constitutions of the world, such as the U.S.A., Australia and Eire. The problem of State Barriers under the Indian Constitution is, apart from its importance, also complicated by virtue of the fact that the framers of the Indian Constitution had to evolve not only a formula for the unity of India as a whole but also find a solution for the many demands of the States consistent with the dominant idea of the unity of the country. The next lecture will not only be a study on the measure of success the framers of the Indian Constitution has achieved in harmonising local demands with the unity of the country but also a scrutiny of the extent to which State Barriers can extend effectively not only against the Union but against the other neighbouring States.

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24. L.R. (1921) 2 A.C. 9.
25. L.R. (1932) A.C. 54.
1. L.R. (1932) A.C. 304.
2. (1920) 60 S.C.R. 456.

BOOK REVIEWS.

Wills, Probate and Administration by *B. S. Ker*, M.A., (Cantab). Published by Sweet and Maxwell, London. Agents in India N. M. Tripathi (Private) Ltd., Princess Street, Bombay 2.

The Law relating to Probate and Administration is as important as it is abstruse and legal practitioners, Executors under testaments and estate administrators have never been too certain of the intricacies of the practice and procedure in this field. No branch of law probably retains its old technicalities of forms and procedure than this branch of the law.

In India the Indian Succession Act covers this field. But the principles of the law are still sought for in the old English decisions and on points of doubt resort is perforce made to English practice and precedents. There are several classical works on the subject and they are frequently referred to by Courts. But a busy practitioner and beginner, not to speak of students of law, gets lost in the bulky volumes of the dry subject. The book under review is a very useful addition to the existing literature on the subject. It is written in simple language with an emphasis on the day to day practice in Courts and tribunals. The subject is dealt with in all its aspects and the book will be an useful asset to every lawyer's office.

Negotiable Instruments Act by J. *J. S. Khergamwala*, LL.D., (Lond.) B.A., LL.M., (Bom.) Eleventh edition (1959)—Published by N. M. Tripathi (Private) Ltd., Princess Street, Bombay 2. Price Rs. 8.50 nP.

Shri Khergamwala's Commentaries on the Negotiable Instruments Act has become an indispensable book for students of law and has become a bye-word in the student world since its first appearance nearly four decades ago. We have had occasion to review some of the previous editions and it is superfluous to introduce the utility of a book that has run through ten successful editions. Like the old popular Mulla's Key to Civil Procedure Shri Khergamwala's work on the Negotiable Instruments Act is simple analytical and exhaustive and we are sure the present edition will be a good seller like its predecessors.

STATE BARRIERS *

Lecture II : Administrative Relations

By

N. ARUNACHALAM, M.A., M.L., *Advocate*.

In this lecture the problem of State-Barriers arising under the Indian Constitution will be examined. It is necessary that if this problem is to be appreciated from a right stand point the nature of the Indian constitutional structure will have to be understood. I crave leave in this context to my writing on THE INDIAN CONSTITUTIONAL STRUCTURE in the *Year Book of Legal Studies*, 1957, published by the Directorate of Legal Studies, Law College, Madras. It is really the objective of the Indian Constitution that has given it the shape. The problem that faced the makers of the Indian Constitution in the circumstances in which the country was actually placed after the terrible upheavals that had already taken place, was to secure the unity of the country as a whole. The design of the constitutional structure, therefore, had not only to take into account the basic idea of the unity of the country but also to have this idea permeated through the entirety of the structure that was to be fashioned. This the makers of the Constitution have done in an admirable way. If this basic idea of the Constitution is lost sight of, the significance of the Indian Constitution will have been lost completely. Every one of the provisions of the Indian Constitution has been so made as to achieve this basic objective of unity of the country in any situation.

The preamble of the Indian Constitution gives the country the status of a *Sovereign Democratic Republic* with the objectives therein set out in addition to achieving the unity of the nation. The objective of the Unity of the Nation is not the expression of a sentiment but seriously meant for as the very opening Article 1 says "India, that is Bharat, shall be a Union of States". The emphasis in the Indian constitutional structure is on *unity*. The other relevant provisions of the Constitution really work out this basic concept of unity.

The present Constitution of the United States, 1789, aims at a more perfect union than the one the country had under the immediately preceding Constitution known as the Articles of Confederation that ended up in failure. The more perfect union objective was sought to be realized in the federal structure erected by the present Constitution of the United States, adopted as a result of the deliberations of the representatives of the thirteen original Colonies that were really sovereign independent commonwealths which voluntarily granted powers to the Federal Government retaining with themselves the residuary powers. In this Constitution, the sovereign equality of the State with the Centre in their respective spheres of activity and the co-operative action of the Centre and the States that is needed if the Constitution is to be amended have been accepted without any reservation. These tests are not fulfilled by the Canadian or the Indian Constitution.

The desire of the provnces of Canada, Nova Scotia and New Brunswick to be federally united into one Dominion find fulfilment in the British North America Act, 1867, which is the Constitution of Canada. The lesson of the Civil War that thereatned to break-up the American Union was there before the makers of the Canadian Union. The framers were anxious to device a scheme which would reject the bad features of the United States Constitution and accept its best features projecting them on the British Constitution. So doing in dealing with the vital core of federal constitution which consists in the distribution of legislative powers the United States way was reversed naming the powers of the Provincial Legislatures and retaining the residuary legislative powers with the Dominion

*Lecture delivered on 26th March, 1960, under the P.R. Sundara Aiyar—V. Krishnaswami Aiyar Endowment, Madras University.

Parliament. The national Constitution embodied in the British North America Act, 1867, governs both the Union and the Provinces. The Union that was sought to be achieved by this instrument had a twofold objective (1) political and (2) economic. Politically it meant to usher into existence a new nation to meet the changed conditions of British policy and get the provinces together against possible American aggression ; economically it meant to foster a national economy which would relieve dependence on a few industries and lessen exposure to the effects of the economic policies pursued by the United States and Great Britain—as pointed out by Bora Laskin. It has been seen that the political structure erected by the Canadian Constitution is a *quasi*-federal structure.

In a vital respect the Indian Constitution making had nothing in common with the United States Constitution making or Canadian Constitution making in the sense representatives of hitherto independent colonies did not meet at the Delhi Constituent Assembly to frame a federal Constitution for the country. The British Indian provinces under the authority of the Central Indian Government were dependencies of the Crown of England. The Native Indian States were formerly subject to the paramountcy of the British Crown enjoying an appreciable measure of internal autonomy. The representatives of the British Indian Provinces in the Constituent Assembly were elected indirectly by the Provincial Legislative Assemblies under the Government of India Act, 1935. The representatives of the Native Indian States or groups of them were the nominees of the Rulers. These representatives were not as their counterparts in America or Canada agitated over the State or provincial rights and how best to protect them. Neither the complexion of the Indian Constituent Assembly nor its dominant purpose compare with anything that preceded it in other countries of importance. Bargaining communities were not there at Delhi to evolve a Constitution. The members assembled were there not only to evolve a structure that would take in all the assimilable good in the Constitutions of countries already referred to, but also to give Indiaa Constitution that would meet the requirements of the country specially from the point of view of its unity; which had been seriously imperilled by the fissiparous tendencies of the Muslim League, which gave birth to Pakistan within the natural limits of India cutting one *people* into two. If this background is appreciated, it will be utterly futile to try to put India into some category or other of the constitutional systems known or can be imagined.

In Canada the Lieutenant Governors of the Provinces are appointed by the Centre. The provincial Judges are also appointed by the Centre. The Centre has the power of veto of provincial legislation. When the Centre legislates for the peace, order and good government of Canada as a whole, the provincial barriers completely break down. That is the reason why Viscount Haldane, L.C., said that Canada can be described as federal only in a loose sense. This is the reason why Prof. K. C. Wheare described the Canadian constitutional structure a quasi-federal structure. The Indian Constitution not only shares the aforementioned features of the Canadian Constitution, but presents certain other features in addition which are destructive of the principles of federalism accepted by the United States of Switzerland. These features of the Indian Constitution influenced Prof. K. C. Wheare to put India also in the quasi-federal category.

Articles 257 and 365 of the Indian Constitution are significant. These articles deal with the control of Union over States in certain respects.

Under Article 257 the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of directions to a State, as may appear to the Government of India to be necessary for that purpose. The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communications declared in the direction to be of national or military importance and this power of the Union does not restrict the power of the Parliament to declare Highways or Waterway

to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

The executive power of the Union shall also extend to the giving of directions to a State as to measures to be taken as to the protection of railways within the State.

If in the carrying out of these directions from the Centre, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State, if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

The extent of the executive power of the Union is fixed by Article 73 as extending to matters with respect to which Parliament has power to make laws and the extent of the executive power of the State has been fixed by Article 162 as extending to matters with respect to which the State legislature has power to make laws. In the competing exercise of the executive powers of the Union and the State respectively under Article 257, the mandate of the Constitution is that in respect of matters referred to in the Article the State executive power ought not to impede or prejudice a Union executive direction. In other words, no State executive barrier can be erected against such Central executive directions.

Article 365 of the Constitution is a far-reaching provision. According to this article where any State has failed to comply with or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of the Constitution, *it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.* India, that is Bharat, shall be a Union of States declares Article 1 (1) and under Article 73 the executive power of the Union extends not only to matters with respect to which Parliament has power to make laws, but also to the exercise of such right, authority and jurisdiction as are exercisable by the Government o India by virtue of any treaty or agreement, *i.e.*, in respect of obligations assumed by the Indian Union in the field of foreign relations. The implementation of treaties and agreements may call for the exercise of not only legislative action but also executive action. Under Article 253 when Parliament makes a law for the whole or part of the territory of India for implementing any treaty agreement, or convention with any other country or countries or any decision made at any international conference, association or other body, that law can cut across the distribution of legislative powers, under Article 246 and Schedule VII of the Constitution. In other words as against legislative implementation by the Union of a treaty or other international agreement State legislative barriers completely break down.

So far as Union executive directions given to the States in the exercise of its executive power, whether in respect of matters over which Parliament has power to make laws or in respect of matters arising out of treaties or international agreements, the States are compelled by Article 365 to comply with such directions. Failing compliance, it shall be lawful for the President to hold that a situation has arisen in which the Government of the disobeying State cannot be carried on in accordance with the provisions of the Constitution, and the situation that is referred to is the situation that arises under Article 356 which deals with the failure of the State constitutional machinery as forming part of the Emergency Provisions under Part XVIII of the Constitution. In a situation in which a State constitutional machinery has broken down, the State administration is superseded and the State is committed to Presidential administration, at any rate until the President is satisfied that the emergency lasts. No wonder, therefore, Alan Gledhill said that the States of the Indian Union hold their status during good behaviour. As against

Union executive direction given in the exercise of its executive power, no Stat executive barrier at all can arise.

What is executive function has not been defined in the Constitution or the General Clauses Act, 1897. The nature of the executive function has, however, been adverted to by the Supreme Court in *Rai Saheb Ramjawaya Kapur* v. *The State of Punjab*[1]. According to this decision executive function consists not only in the determination of policy, but also carrying it out or executing it which in turn naturally implies the initiation of necessary legislation, maintenance of order, promotion of social and economic welfare, direction of foreign policy and generally carrying on the administration of the country.

Article 257 forms part of Chapter II in administrative relations in Part XI dealing with relations between the Union and the States. The Articles of this Chapter have been so designed to ensure the maximum possible co-operation between the Union and the State in the carrying on of the executive government of the country as a whole. It is necessary to point out before the other provisions of this Chapter are examined that the Union executive can make its will felt effectively on the States. These provisions appear to embody a co-operative conception of the relationship of the States with the Union in order to realise the purposes of the Constitution. The observation of Corwin on the *Hoke case* may well be applied to the provisions of Chapter II of Part XI of the Indian Constitution. Observing that unquestionably co-operative federalism invites more and more concentration of national power, he goes on to point out that when two co-operate, it is the stronger member of the co-operation who usually calls the tunes.

Under Article 256 the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. Failure to comply with the directions of the Centre will amount to a breakdown of the State constitutional machinery according to Article 365 of the Constitution.

In order to make Union-State co-operation real, it has also been provided in Article 258 that the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. A parliamentary law that applies to a State may notwithstanding that it relates to a matter with respect to which the State legislature has no power to make laws, confer powers and impose duties upon the State or its officers and the authorities. There was a similar provision in the Government of India Act, 1935 and it was because of that provision in *Raghubar Singh* v. *Rex*[2] it was held that it was valid to designate the Advocate-General of a province to be in control of the initiation of proceedings under the Insurance Act, 1938. When a State or State Officers and authorities function by virtue of the powers conferred under this Article, the extra cost of administration incurred by the State in this behalf shall be paid to the State by the Government of India. But if disagreement arises as to the amount payable, any amount that may be determined by an arbitrator appointed by the Chief Justice of India shall be paid to the State by the Government of India.

Under the new Article 258-A, introduced by the Constitution Seventh Amendment Act, 1956, the Governor of a State may with the consent of the Government of India either conditionally or unconditionally entrust to the Government of India or to its officers functions in relation to any matter to which the executive power of the State extends.

Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State under Article 261, clause (1).

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1. (1935) S.C.J. 504: (1955) 2 M.L.J. (S.C.) 59: A.I.R. 1955 S.C. 549.

2. (1944) F.C.R. 143: 1944 F.L.J. 60: (1944) 1 M.L.J. 207: A.I.R. 1944 F.C. 25.

The manner in which and the conditions under which the acts, records and proceedings referred to in the preceding clause shall be proved and the effect thereof determined shall be as provided by law made by Parliament under Article 261, clause (2).

Final judgments or orders delivered or passed by Civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law under Article 261, clause (3).

Article 261 emphasises that the status of a State arises by virtue of its membership of the Indian Union and implies that nothing that any State may do should injuriously affect anything that the other States or the Union may legitimately be entitled to do under the Constitution. Clauses (1) and (2) of Article 261 are the same as Article IV, section 1 of the United States Constitution and clause (1) of Article 261 is the same as section 118 of the Australian Constitution. Clause 3, of Article 261 deals with the execution of decrees passed in one part of the Indian territory in other parts of the Indian territory and that the execution levied shall be in accordance with the law of the place where the decree is put into execution and this emphasises the fact that the States of the Indian Union *inter se* are not foreign to each other. Public acts mean statutes. Public records mean public records as defined by the Indian Evidence Act. The method of proof and the effect that is to be given on such proof of public acts, records and judicial proceedings are matters for regulation by law of Parliament and not of the State Legislature. If according to such parliamentary law public acts, records and judicial proceedings are proved, full faith and credit shall be given to them throughout the territory of India and such effect given to them as may be determined by the Parliamentary law—without examination of the merits of the public acts, records and judicial proceedings. In other words, when once a public act, record or judicial proceeding of a State stands proved, it shall be given its effect as prescribed by law throughout the Indian Union and nothing that any other State may do can come in the way of such effect being given.

Under Article 262 (1) Parliament may by law provide for adjudication of any dispute or complaint with respect to any use or distribution or control of the waters of, or in any inter-State river or river valley. Inter-State dispute over the waters of or in any inter-State river or river valley is a matter for adjudication as prescribed by Parliamentary law, if the Parliament chooses to make such a law. It is further provided by Article 262 (ii) that, though an inter-State dispute of this kind may come within the original jurisdiction of the Supreme Court under Article 131 for instance, the Parliamentary law that may be made in this behalf can provide that neither Supreme Court or any other court shall exercise jurisdiction in any such dispute. Maybe, that this enabling provision has been made in order to avoid the inevitable delays involved in a Court litigation particularly in view of the fact such disputes call for quick decision. A dispute of this kind may be brought up for solution under Article 263 also which states that if at any time it appears to the President that the public interest would be served by the establishment of a Council charged with the duty of (1) enquiring into and advising upon disputes which may have arisen between States, (2) investigating and discussing subjects in which some or all of the States or the Union or one or more States have a common interest, or (3) making recommendations upon any such subject and in particular recommendations for better co-ordination of policy and action with respect to that subject, it shall be lawful for the President by order to establish such a Council and define the nature of the duties to be performed by it and its organisation and procedure. This provision has been really implemented by the erection of zonal councils under the States Reorganisation Act, 1956.

The entire objective of Chapter II of Part XI appears to be that as far as possible the Union Administration and the State Administration shall so function that the unity of the country as a whole is not jeopardised.

Legislative Relations.

Chapter I of Part XI deals with legislative relations comprising Articles 245 to 255. On the legislative side again the articles are so designed that the State legislative barriers are reduced to the minimum possible.

Under Article 245 (1) subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State and under Article 245 (ii) no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 is important in the sense that it fixes the legislative competence of the Parliament and the State legislature in respect of matters enumerated in the three lists of the VII Schedule of the Constitution. List I is the Union List. List II is the State List and the List III is the Concurrent List.

Under clause (1) of Article 246 notwithstanding anything in clauses (ii) and (iii) Parliament has exclusive power to make laws with respect to any of the matters enumerated in the Union List. Under clause (ii) of Article 246 notwithstanding anything in clause (iii), Parliament and subject to clause (1) the legislature of any State also have power to make laws with respect to any of the matters enumerated in the Concurrent List.

Under clause (iii) of Article 246 subject to clauses (i) and (ii) the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in the State List.

Under clause (iv) of Article 246 Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State, notwithstanding that such matter is a matter enumerated in the State List.

Article 248 declares that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List and such power shall include the power of making any law imposing a tax not mentioned in either of those Lists. Entry No. 97 in the Union List of VII Schedule refers to any matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

The pattern of distribution of legislative power under the Indian Constitution is the same as under the Canadian Constitution. The three-lists idea is also a borrowing from the Canadian Constitution. The Government of India Act, 1935, borrowed this three-lists idea for the first time and the present Indian Constitution continues this idea. So far as the Concurrent List under the Canadian Constitution is concerned, Agriculture and Immigration alone form part of the concurrent list of the Canadian Constitution and section 95 of the Canadian Constitution states that in a case of repugnancy or inconsistency between a Central or Provincial law over a concurrent list item, the Central law will prevail. As in the case of the Canadian Constitution in the case of the Indian Constitution also the residuary legislative powers are lodged in the Union Parliament.

Article 245 fixes the territorial jurisdiction of the Union Parliament and State Legislature respectively. Article 246 fixes the legislative competence or legislative jurisdiction or Legislative power of the Union Parliament and State Legislature respectively. The scheme of distribution of legislative powers appears to be that the Union Parliament gets exclusive legislative jurisdiction over items enumerated in the Union List, though there may be overlapping with the entries in the State and Concurrent Lists. The State legislature gets exclusive legislative competence over items enumerated in the State List provided that a matter is not covered by entries in the Union or Concurrent List. In order that the State Legislature may have exclusive legislative competence over a matter it must be one of the enumerated entries in the State List not falling within any of the entries in the Union List or the Concurrent List. If a matter is covered by the Concurrent List and the Union

List, the Union Parliament gets exclusive legislative competence to pass laws over that matter. If on the other hand a matter falls exclusively in the concurrent list or in the concurrent list or State list, that would be a common field of legislation in respect of which the Parliament and State legislature have equal legislative competence.

In this scheme of distribution of legislative powers inconsistency between Union law and State law is bound to arise and this problem of inconsistency has been met by Article 254. If a State law is repugnant to a Union law or to any existing law with respect to an entry in the concurrent list subject to clause (ii) of Article 244; the Union law whether passed after or before the State law or as the case may be, the existing law shall prevail and the State law shall to the extent of repugnancy be void. Clause (ii) of Article 244 however states that where a State law with respect to an entry in the concurrent list is repugnant to a Union law or an existing law with respect to the same entry the State law will prevail in the State if it has been reserved for the consideration of the President and has received his assent. But the Union can enact a law any time with respect to the same entry including a law adding to or amending, varying or repealing the State law. In the concurrent field of legislation, in the ultimate analysis, the power of Parliament is supreme.

The normal distribution of legislative power under Article 246 read with Schedule VII of the Constitution is at once set aside when the Council of States passes a resolution declaring that it is necessary in national interest that Parliament should make laws with respect to any matter in the State List referred to in the resolution, the resolution being backed by a two-thirds majority of members of that House present and voting. Under Article 249, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution is in force. The normal life of such a resolution is one year but it can be extended further by one more year. The entire country is looked at as one unit.

Article 250 (1) says that when a proclamation of emergency is in force—one issued under Article 352 (1) of the Constitution, the normal distribution of legislative powers is set aside for the duration of the proclamation and Parliament gets the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

The most important point about a law of Parliament made either undes Article 249 or Article 250 in respect of a matter enumerated in the State List ir that it shall prevail and any law of the State Legislature passed before or after the law of Parliament shall to the extent of its repugnancy with the law of Parliamens be inoperative but however it may be noted the law of the State Legislature revivet after the law of Parliament ceased to have effect. Any State Legislative barrier against a Parliamentary law passed under Article 249 or Article 250 is of no effect at all so long as the Parliamentary law continues to operate.

In respect of matters falling outside Articles 249 and 250 over which Parliament has no power to make laws for the States, if two or more states feel that any such matter be regulated by the law of Parliament, if resolutions to that effect are passed by all the Houses of all the Legislatures of the States involved, then Parliament gets the power to pass such a law applicable in common to those States by virtue of Article 252 of the Constitution. Any other State also may adopt such law if the House or Houses of the Legislature of that State passes a resolution adopting the law. An amendment or repeal of any Act of Parliament of this kind can be passed or adopted in like manner as the passing of the original Act but shall not as respects any State to which it applies be amended or repealed by an Act of the State Legislature.

The normal distribution of legislative powers gets upset when under Article 253 Parliament legislates for the whole or any part of the territory of India for

implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Such law of Parliament can cut across all legislative impediments arising from the normal distribution of legislative powers under Article 246 read with VII Schedule of the Constitution. This is a power similar to the one conferred by section 132 of the Canadian Constitution on its Parliament. In *A. G. Canada* v. *A. G. Ontario*[3], it is pointed out that there is a difference between the making of a treaty and the performance of the treaty made—the former is an executive act and latter is a legislative act. If the performances of the treaty, that is not self-executing and such performance should affect domestic law or impose a tax burden, then it can be done only by legislation. It is necessary to mention in this context that under Article 73 the executive power of the Union extends to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement and the State executive power under Article 162 does not extend to these matters.

In particular cases even if a matter falls within normal State Legislative jurisdiction, the State Legislature is not free to act on its own.

A Bill may require the previous sanction of the President for its introduction into the State Legislature. If a State law should impose reasonable restrictions on the freedom of trade, commerce or intercourse as may be required in public interest, under the proviso to Article 304 it is necessary that the Bill or amendment for the abovestated purpose shall be introduced only with the previous sanction of the President.

A Bill may be reserved by the Governor for the consideration of the President. Under Article 200 of the Constitution when a Bill has been duly passed by the House or Houses of a State Legislature, it shall be presented to the Governor and the Governor may declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President. Reservation of a Bill for consideration of the President is mandatory if in the opinion of the Governor it would, if it became law so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill. A Bill of the kind contemplated by clause (3) or clause (4) of Article 31 will have to be reserved for the consideration of the President and receive his assent.

Under Article 254 dealing with inconsistency between Union law and State law with respect to a matter in the concurrent list, a Bill passed by the State Legislature must be reserved for the assent of the President and receive his assent as otherwise the law will be invalid.

Under Article 213, a State Governor shall not promulgate an Ordinance in respect of these matters without instruction from the President and such instruction in an urgency shall be a substitute for the previous sanction, consideration and assent or assent that may be necessary when normal legislative procedures are gone through.

Article 255 treates recommendation whether of the President or Governor of previous sanction, consideration and assent as purely matters of procedure and it is true an Act that has received the assent of the President cannot be challenged for its validity that any of these procedural conditions have not been complied with in the passing of such a law and these defects of procedure are cured by the Presidential assent (Vide: *The Jain Transport* v. *U.P.*[4] and *Gauri Shankar* v. *Jhunjhun Municipality*[5].

Under the Constitution of India it was pointed out by Kania, C.J., In re: *Article* 143, *Constitution of India, etc.*[6] that the executive power of the Union is vested in the President acting on the advice of his cabinet. There is a Parliament to make

3. (1937) A.C. 326.
4. A.I.R. 1957 All. 320.
5. A.I.R. 1958 Raj. 192.
6. A.I.R. 1951 S.C. 332.

laws and a Supreme Court with powers and jurisdiction defined by the respective Articles of the Constitution. It is only the executive power that is vested in the President. But the Legislature and judicial powers are not so vested in the respective processes. It is a Parliamentary executive that is erected by the Indian Constitution, in the sense that the President acts on the advice of his Cabinet and the Cabinet is responsible to the House of the People and in this sense the Indian Constitution adopts the British Cabinet System of Government. The Indian Parliament, however, is not the same as the British Parliament, the former derives its powers, privileges and immunities from the relevant Articles of the Indian Constitution, while the latter is a sovereign body with uncontrolled, and unlimited legislative capacity. The legilative capacity of both the Indian Parliament and the State Legislatures are defined and controlled by the relevant Articles of the Indian Constitution, their powers are derivative and not original or inherent and therefore an Act that may be passed whether by the Indian Parliament or a State Legislature must be one within its capacity as fixed by the Constitution. This is the very first test that a law of Parliament or a law of a State Legislature will have to fulfil and failure to do so will make the law invalid or unconstitutional and in will be struck down by the Court accordingly.

Even if the test of Legislature capacity is fulfilled by a law of Parliament or of a State Legislature, it may still become invalid or unconstitutional for the reasons that it is violative of either an Article or Articles of the Fundamental Rights, Part III of the Constitution or of certain other Articles of the Constitution such as Article 302 or 304 dealing with the power of the Parliament and State Legislature respectively, to pass laws restricting the freedom of trade, commerce and intercourse throughout the territory of India. I mention these facts to show that though the attributes of legislative sovereignty are to pass tax laws, eminent domain laws and Police Power laws, the exercise of these powers is cut down or limited by the provisions of Part III and certain other provisions of the Constitution.

Some kind of federal arrangement having been decided on by the Indian Constitution the main objective of which was to secure the political unity of the country as a whole, the same federal arrangement had to see to it that the economic unity of the country was also to be preserved removing or preventing the State barriers to such national economic unity. This is how Part XIII of the Constitution dealing with trade, commerce and intercourse within the territory of India emerged. This had to be done because the framers of the Indian Constitution like the framers of the other leading Constitutions of the world realised that political unity without economic unity may mean nothing. Among the many parts of the Indian Constitution Part XIII is next only to Part III in importance.

Inter-State Commerce Under the Indian Constitution.

Article 301 says that subject to the other provisions of this part (Part XIII Articles 301 to 307) trade, commerce and intercourse throughout the territory of India shall be free. The word commerce is used in the sense of commerce in the Commerce Clause of the United States Constitution and it takes in the narrow meaning of trade and the wide meaning of intercourse—commercial intercourse as understood by Marshall, C.J., in *Gibbons* v. *Ogden*[7]. The freedom of commerce declared by this Article is subject to the exemptions referred to in the other Articles of Part XIII.

The other Articles of this part are in the nature of provisos to Article 301. This part, however, which by its opening Article declares the freedom of inter-State commerce, cannot override the other parts of the Constitution (The High Court judgment in *The State of Bombay* v. *Chamarbugwalla*[8] and *H. P. Barua* v. *The State of Assam*[9]. The restrictions that can be imposed upon the freedom of commerce are those indicated in the other Articles of Part XIII.

7. (1803) 9 Wheat 1.
8. A.I.R. 1956 Bom. 1.
9. A.I.R. 1955 Assam 249.

Dealing with the Article 301 of the Constitution Ram Labhaya, J., points out in *H. P. Barua's case*[10], just noticed :

" The undoubted purpose of Article 301 is to preserve and maintain the economic unity of India. It provides for free flow of traffic. It hits States barriers against the free flow of trade and commerce which is contemplated by it. Both prohibitions against and restrictions on the movement and free flow of goods and commodities would be hit by Article 301. Yet trade, commerce and intercourse could not be absolutely free from all kinds of restrictions.

Articles 302 and 304 permit restrictions in public interest. It follows that any legislation which falls under Entries 42 of List I, 26 of List II and 33 of List III which relate to trade and commerce, must conform to the requirements of Articles 302 and 304.

Under these entries restrictions may be placed on the free flow of trade and commerce in public interest. Legislations which regulates trade, commerce and intercourse in public interest would be covered by Articles 302 and 304. This does not admit of any dispute. The question is whether taxation *per se* regardless of actual effect on the free movement of goods and commodities is hit by Article 301 as restrictive of or reducing the freedom, of trade, commerce and intercourse. If so it may be argued that restrictions contemplated by Articles 302 and 304 include taxation and it must also be in public interest. The issue is as difficult as it is important.

But my answer to the question is that the two parts of the Constitution namely Parts XII and XIII are independent of each other and self-contained. While Part XII deals with finance including taxation, Part XIII deals with freedom of trade, commerce and intercourse and thus freedom from restrictions other than those that may be imposed by permissible taxation under Article 246 read with the relevant entries ".

Article 302 states that Parliament may by *law* impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in *public interest.* This power of Parliament to impose restrictions on the freedom of commerce between one State and another, is exactly similar to the federal police power which is a new American Constitutional doctrine that has been affirmed in *U.S.* v. *Darby*[11], overruling *Hammer* v. *Dagenhart*[12].

Article 303 (1) states that notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving or authorising the giving of, any *preference* to one State over another, or making or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. List I, Union List item 42 is inter-State trade and commerce. Parliament has the power to legislate on interest trade and commerce. List II, State List item 26 is trade and commerce within the State subject to List III concurrent List item 33 trade and commerce, in and the production, supply and distribution of—

(*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by Law to be expedient in public interest, and imported goods of the same kind as such product ;

(*b*) foodstuffs, including edible oilseeds and oils ;

(*c*) cattle fodder, including oil cakse and other concentrates ;

(*d*) raw cotton, whether ginned or unginned and cotton seed ; and

(*e*) raw jute.

10. A.I.R. 1955 Assam 249.

11. (1941) 312 U.S. 100.

(118) 247 U.S. 251.

This entry in List III was substituted by the Constitution Third Amendment Act, 1954, in the place of the old entry No. 33. Trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient in the public interest. It was as result of the amendment of this entry in the manner stated, that the Parliament passed the *Essential Commodities Act* (*X of* 1955) to provide in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce in, certain commodities—in order to implement, if necessary, the enabling provision in clause (2) of Article 303 under which it has been declared, though as a general rule under Article 303, clause (1) it is incompetent for either Parliament or the State Legislature to make a preferential or discriminatory law by virtue of the relevant entries aforesaid in List I and List II, Parliament shall not be prevented from making any law giving or authorising the giving of any preference or making or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. Section 3 of the aforesaid statute vests the power in the Central Government to control production supply and distribution of essential commodities in a crisis situation arising from scarcity of goods in any part of the territory of India.

Though it is under Article 301 that trade, commerce and intercourse shall be free throughout the territory of India and though it is that under Article 303 neither the Parliament nor any of the State Legislatures can make any preferential or discriminatory law by virtue of the relevant legislative power belonging to it, the Legislature of a State may by law.

(*a*) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however as not to discriminate between goods so imported or goods so manufactured or produced ; and

(*b*) impose such reasonable restrictions on the freedom of trade, commerce, or intercourse with or within that State as may required in public interest. But a Bill or Amendment for this purpose shall not be introduced or moved in the Legislature of a State without the previous sanction of the President.

This power of the State Legislature to pass a law in public interest is similar to the power of the Parliament to pass a law in public interest by restricting the freedom of inter-State commerce—the condition of reasonableness is not attached to parliamentary law of this kind.

Clause (*a*) of Article 304 gives the power to the State Legislature to pass a non-discriminatory tax law on imports from other States on condition that similar goods produced in the same State are subject to the same tax law and clause (*b*) of Article 304 empowers the State Legislature to impose reasonable restrictions by law as may be required in public interest on the freedom of commerce guaranteed under Article 301 and this is but a recognition of the police power in the State.

It was as a result of an observation of Mukherjea, J., in *Saghir Ahmed* v. *State of U.P.*[13], that though by the Constitution First Amendment Act, 1951, Article 19 (6) which qualifies Article 19 (1) (*g*) has been amended enabling the State making a law to carry on any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise, a corresponding provision had not been made with reference to the declared freedom of inter-State commerce under Article 301. It was as a result of this observation that Article 305 was amended by the Constitution Fourth Amendment Act, 1955, so that the prohibition on the power to pass preferential and discriminatory laws by the Parliament and the State Legislature in Article 303 against free trade may be brought into line with the State's power to pass a monopoly law under Article 19 (6) by way of restriction on the right of

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13. (1954) S.C.J. 819 : A.I.R. 1954 S.C. 728 (S.C.).

the citizen under Article 19 (1) (*g*) to practice any profession, or to carry on any occupation, trade or business.

The new Article 305 substituted in the place of the old Article 305, reads : "Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct . and nothing in Article 301 shall affect the operation of any law made before the commencement of the Constitution Fourth Amendment Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to any such matter as is referred to in sub-clause (ii) of clause (6) of Article 19.

Article 307 authorises Parliament to appoint by law such authority as it considers appropriate, *e.g.*, an Inter-State Commerce Commission of the kind that has been erected in the United. States by congressional law for carrying out the purposes of Articles 301, 302, 303 and 304 and confer on the authority so appointed such powers and such duties as it thinks necessary.

STATES POWER OVER INTER-STATE COMMERCE.

Under Article 303 (1) though it may be that the State Legislature has the legislative capacity to pass a law, it has no capacity to pass such law if it should be discriminatory or preferential in nature in relation to inter-State trade. So far as the power of the State over inter-State commerce or even intra-State commerce is concerned though it is empowered under Article 304 (*b*) to impose reasonable restrictions on it as may be required in public interest, no bill or amendment for this purpose shall be introduced or moved in the State Legislature without the previous sanction of the President. As head of a parliamentary executive when the President decides to accord sanction or to refuse sanction, he acts on Union cabinet advice under Article 74 of the Constitution. In the United States, the State police power is a barrier against inter-State commerce and the erection of the barrier need not await the pleasure of the Federal Government but in India, however legitimate may be the State's reason for the exercise of its police power, the exercise of such power will have to await the sanction of the President. If, however, the Union police power is exercised by Parliamentary law the restriction that may be imposed may even be arbitrary as Article 302 which enables the Union to exercise this power does not impose the condition of reasonableness on the law that may be passed. On the other hand in the exercise of the Police power by the State it is necessary that the law of the State Legislature will have to conform to the test of reasonableness, it it is to survive on scrutiny by the Courts of the land.

It has been held in *H. P. Barua* v. *The State of Assam*[14], that Article 301 which guarantees the freedom of inter-State trade does not affect the power of the State Legislature under Article 246 read with Schedule VII of the Constitution, List II, item 56 to levy taxes on goods and passengers carried by road or inland waterways. In *Kuttikeya* v. *The State of Madras*[15], after pointing out that Article 304 in prospective in its operation, the validity of *the Madras Commercial Crops Market Act* (*XX of* 1933), though it was found violative of the freedom of inter-State trade guaranteed under Article 301, was upheld-saved as it was in its validity as an existing law by Article 305. In *Surajmal Raj* v. *The State of Rajasthan*[16], it was pointed out that the entry duty on goods imposed under a pre-Constitution law of Rajasthan was violative of the freedom of inter-State trade, as it imposed a restriction on the movement of goods involved. This freedom, however, is subject to the other provisions of Part XIII and Article 304 thereof permit imposition of reasonable restrictions by State law, on condition that the bill before it was introduced received the sanction of the President but this provision of the Constitution has only a prosepective operation and it cannot therefore, be invoked to test the validity of the impugned law which was admittedly an existing law within the meaning of Article 366, clause (10) and as such its validity was saved under Article 305.

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14. A.I.R. 1955 Assam 249.
15. (1954) 1 M.L.J. 117 : A.I.R. 1954 Mad. 621.
1 A.I.R. 1954 Raj. 260.

In *State of Bombay* v. *The United Motors (India) Ltd.*[17], Patanjali Sastri, C.J., observed, "It will be seen that the principle of freedom of inter-State trade and commerce declared in Article 301 is expressly subordinated to the State power of taxing goods imported from sister States provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State power of imposing *any* non-discriminatory tax on goods imported from sister States".

NATIONALISATION OF TRADE.

The Constitution First Amendment Act, 1951, introduced among other things clause (ii) of clause (6) of Article 19 as a qualification on the right of a citizen under Article 19 (1) (*g*) to carry on any occupation, trade or business and under the said clause (ii) of clause (6) of Article 19 nothing in the guarantee in favour of a citizen to carry on any occupation, trade or business shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to the carrying on by the State or by a Corporation owned or controlled by the State, of any trade business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise, Article 305 as amended by the Constitution Fourth Amendment Act, 1955, declares that despite the declared freedom of inter-State commerce under Article 301, nationalisation laws passed prior to the Constitution Fourth Amendment Act, 1955 or nationalisation laws of Parliament or the State Legislature passed subsequent to the Constitution Fourth Amendment as are referred to in the new clause (ii) of clause (6) of Article 19 shall have full force and effect. State monopoly in motor transport on roads on particular routes has been upheld in *Ram Chandrapalai* v. *State of Orissa*[18].

In the *State of Bombay* v. *R. M. D. Chamarbaugwalla*[19], it is observed that, "Article 19 (1) (*g*) and Article 301 are two facets of the same thing—the freedom of trade. Article 19 (1) (*g*) looks at the matter from the point of view of the individual citizen and protects his individual right to carry on his trade or business. Article 301 looks at the matter from the point of view of the country's trade and commerce as a whole as distinct from the individual interest of the citizens and it relates to trade, commerce or intercourse both with and within the States.

Article 19 (1) (*g*) was amended by the addition of clause (ii) to clause (6) of Article 19 by the Constitution First Amendment Act, 1951,so as to enable the pushing through of State nationalisation schemes and when Mukherjea, J., made his observation is *Saghir Ahmad* v. *The State of U.P.*[20] that the nationalisation laws may be violative of the freedom of inter-State trade guaranteed under Article 301, the Constitution Fourth Amendment Act, 1955, appropriately amended Article 305 which, as it stands now not only continues the validity of existing laws that burden the freedom of inter-State trade and commerce but (though a Presidential order may relieve such a burden) but also states that neither Parliament nor any State Legislature will be prevented from making any law relating to any such matter as is referred to in Article 19, clause (6), sub-clause (ii)—nationalisation of trade and commerce. By appropriate use of this enabling provision, private enterprise can be completely killed and such killing protected under both Article 19, clause (6), sub-clause (ii) and Article 305 as they stand now.

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17. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : A.I.R. 1953 S.C. 252 (S.C.).
18. (1956) S.C.J. 293 : A.I.R. 1956 S.C. 298.
19. (1957) S.C.J. 607 : (1957) 2 M.L.J. (S.C.) 87: (1957) 2 An. W.R. (S.C.) 87 : (1957) M.L.J. (Crl.) 558 : A.I.R. 1957 S.C. 699.
20. (1954) S.C.J. 819 : A.I.R. 1954 S.C. 728.

ARTICLE 286 RESTRICTIONS AS TO IMPOSITION OF TAX ON THE SALE OR PURCHASE OF GOODS.

Article 286 of the Constitution is an instance to show how the freedom of inter-State trade and commerce declared by Article 301 is sought to be secured to the maximum extent necessary and consistent with the economic unity of the country by placing restrictions on the State Legislature's power in regard to the imposition of taxes on the sales or purchases of goods. In a poor country like India under whose Constitution the power to levy income-tax is given over to the Union, and the only source of income for the State is the sales or purchase tax, that the State is empowered to levy sales or purchase tax. This being the position in the absence of an Article like Article 286, the States of the Union may make the maximum use of the power belonging to them and tax sales or purchases in such a way that the freedom of inter-State trade and commerce guaranteed under the Constitution with the objective above mentioned is completely effaced and this is what is sought to be prevented by the restrictions imposed by Article 286 on this power of the State.

Article 286 as it stood before, the Constitution Sixth Amendment Act, 1956, ran thus :

286 (i) No law of a State shall impose or authorise the imposition of a tax on the sale or the purchase of goods were such sale or purchase takes place—

(*a*) outside the State ; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purpose of sub-clause (*a*), a sale or purchase *shall be deemed to have taken place* in the State in which the goods have actually been *delivered* as a *direct result* of such sale or purchase *for the purpose of consumption* in that State, notwithstanding the fact that under the general law relating to the sale of goods the property in the goods has by reason of such sale or purchase passed in another State. (Italics mine).

(2) *Except in so far as Parliament may by law otherwise provide,* no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce.

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution shall notwithstanding that the imposition of such tax is contrary to the provisions of this clause continue to be levied until the 31st day of March, 1951.

(3) No law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

In the *State of Bombay* v. *The United Motors (India) Ltd.*[21], the majority Court pointed out that Article 286 (1) (*a*) prohibited tax on sales or purchases that take place outside the State and also realising that the localised sale gave rise to difficulties, inasmuch as a sale of goods involved an agreement to sell, transfer of ownership, payment of the price, delivery of the goods, etc., any of which may take place outside the State, though each of which is as important as the other, drew attention to the *Explanation* added to clause (1) which sought to resolve the serious difficulty above adverted to. The *Explanation* is really in the nature of a legal fiction according to which the State in which the goods are sold or purchased for consumtption there-

21. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743: A.I.R. 1953 S.C. 252.

in is the State in which the sale or purchase should be treated as the place where the sale or purchase has taken place—notwithstanding the fact that the property in the goods may have passed in another State under the general law relating to the sale of goods. Then the further question will have to be answered are the goods actually delivered in the taxing State as a direct result of a sale or purchase for the purpose of consumption therein ? If the answer is in the affirmative then the sale or purchase shall be deemed to have taken place in that State and in that State to the exclusion of the other States that may be involved in the transaction. The delivern. State alone will have the right to impose a tax on the sale or purchase in questioy and this construction avoided multiple taxation of the transaction by the different States. The *Explanation* imposes the condition of consumption in the State and the expression " for the purpose of consumption in the State " must be understood as referring to not only the individual importer or purchaser but as contemplating distribution eventually to consumers within a State. All buyers within the delivery State from sellers outside the State except those buying for re-export out of the State will come within the scope of the *Explanation* and render themselves liable to be taxed by the State on their inter-State transactions. The *Explanation* is concerned only with the inter-State sales or purchases and not with purely local or domestic transcations. In other words Article 286 read with the *Explanation* thereto prohibits taxation of sales or purchases involving inter-State elements by all the States concerned except the State in which the goods are delivered for the purpose of consumption therein in the way indicated above. The delivery State in this sense is left free to tax the sale or purchase and this power is derived by the State not by virtue of the *Explanation* but by virtue of Article 246, clause (3) read with Schedule VII, List II, item 54.

" The operation of clause (2) stands excluded as a result of a legal fiction enacted in the *Explanation* and the State in which the goods are actually delivered for consumption can impose tax on inter-State sale or purchase. The effect of the *Euplanation* in regard to inter-State dealings is in our view is to invest what, in truth, is an inter-State transaction with an inter-State character in relation to the State of delivery, and clause (2) can, therefore, have no application. It is true that the legal fiction is to operate for the purposes of sub-clause (*a*) of clause (1) but that means merely that the *Explanation* is designed to explain the meaning of the expression ' outside the State ' in clause (1) (*a*). When once, however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the taxing State, it follows as a corollary that the transaction loses is inter-State character and falls outside the purview of clause (2) not because the definition in the *Explanation* is used for the purpose of clause (2) but because such sale or purchase becomes in the eye of the law a purely local transaction." The *Explanation* envisaged sales or purchases under which out of State goods are imported into the State. Clause (2) it is pointed out was not intended to affect the power of the delivery State to tax inter-State sales or purchases of the kind referred to in the *Explanation*. That is because the principle of freedom of inter-State trade guaranteed under the Constitution is made to give way before the power of the State of imposing non-discriminatory taxes on goods imported from other States. Article 286 (2) is but one phase of the protection accorded to inter-State trade and commerce from the fettering power of State taxation. " As Article 286 deals with the restrictions on the power of the State to impose tax on sales or purchase of goods, the Constitution makers evidently thought that it should contain also a specific provision safeguarding sales or purchases of an inter-State character against the taxing power of the State.

Bengal Immunity Company Ltd. v. *The State of Bihar*[22]. This is a case which overrules the decision of the Supreme Court in the *State of Bombay* v. *United Motors*[23]. In this case reference is made to the marginal note to Article 286—Restrictions as to imposition of tax on the sale or purchase of goods—which unlike the marginal notes in Acts of British Parliament is part of the Constitution as passed by the Consti-

22. A.I.R. 1955 S.C. 661: (1955) S.C.J. 672: (1255) 2 M.L.J. (S.C.) 168.
23. (1953) S.C.J. 373: (1953) 1 M.L.J. 743: A.I.R. 1953 S.C. 252.

tuent Assembly and *prima facie* furnishes some clue as to the meaning and purpose of the Article. This apart the language of the Article itself is clear in its objective to place restrictions on the legislative powers of the States with respect to impositions of taxes on sales and purchases of the goods. Dealing with the scope of Article 286, it is pointed out that it should be noted that there are four separate and independent restrictions placed on the legislative competency of the State to make a law with respect to matters enumerated in item 54 of List II. " In order to make the ban effective and to leave no loophole, the Constitution makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus in clause (1) (*a*) of Article 286 the question of the *situs* of a sale or purchase engaged their attention and they forged a fetter on the basis of such *situs* to cure the mischief of multiple taxation by the States on the basis of the *nexus* theory.

In clause (1) (*b*) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the State taxing power in order to make our foreign trade free from any interference by the States by way of a tax imposed. In clause (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of freedom of internal trade. Finally in clause (3) the Constitution makers attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the State's power of imposing tax on sales or purchases of goods declared to be essential for the life of the community.

These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but nevertheless they are distinct and one has nothing to do with and is not dependent on the other or others. The State's legislative power with respect to a sale or purchase may be hit by one or more of these bans ". The scope of Article 286 as laid down in this case is made more then clear by the Constitution Sixth Amendment Act, 1956 and this Amending Act has deleted the *Explanation* to Article 286, clause (1). Sub-clauses (2) and (3) are substituted by the new sub-clauses (2) and (3). The result, therefore, is that Article 286 reads thus now.

Article 286 (1): No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place:—

(*a*) outside the State or

(*b*) in the course of the import of the goods into or export of the goods out of the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall in so far as it imposes, or authorises the imposition of a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

Immediately after the *Bengal Immunity decision*[24] the Sales Tax Law Validation Act(VII of 1956)was passed by the Union Parliament and the reason why this enactment was made is referred to in *the Mysore Spinning and Manufacturing Company* v. *The Deputy Commercial Tax Officer*[25], and it is stated that if the *United Motor's decision*[25-a] of the Supreme Court had stood, the States would not lose much of their revenue, as tax on most of the sales which were previously brought within the scope of taxation provisions of the Sales Tax Act of various States could still be levied. " The practical effect, therefore, of the decision of Supreme Court and notwithstanding Article 286 (2) of the Constitution and notwithstanding the absence of Parlia-

24. (1955) S.C.J. 672: (1955) 2 M.L.J. (S.C.) 168: A.I.R. 1955 S.C. 661.
25. (1957) 2 M.L.J. 167.
25-a. *Vide* Footnote No. 21.

mentary legislation within the opening words of Article 286 (2), the States were able to levy taxes practically on the same type of transactions as before. Then came the *Bengal Immunity Case*[1], where the Supreme Court again by a majority overruled the decision in the *State of Bombay* v. *United Motors*[2], holding that the Explanation to Article 286 (1) (*a*) could not be read into Article 286 (2) so as to render what might be termed as explanation sale as a sale in the course of inter-State sale. This decision meant that the taxes levied on what might be termed Explanation Sales were treated as illegal and the States were faced with two problems (1) having to refund taxes already levied and collected and (2) to desist from levying or collecting tax notwithstanding that on the date when the tax liability accrued the States would have been entitled to the taxes on the interpretation of Article 286 as it then stood, and the States had arranged their budgets on that basis. It was to remedy this dislocation that the Centre stepped in with this impugned enactment ".

THE CENTRAL SALES TAX ACT (LXXIV OF 1956.)

The *Bengal Immunity decision*[1] held, that unless it is otherwise provided, by a law of the Union Parliament no tax can be imposed by a State law on sales and purchases that take place in the course of inter-State trade whether or not they come within the *Explanation* to Article 286, clause (1). Naturally this gave rise to a very serious situation as noticed already for the States that had framed their budgets on the footing of the Constitutional position as laid down in the *United Motors case*[2] and *The Mysore Case*[3], above-quoted notices these aspects of the situation which naturally led to the passing of the Sales Tax Validation Act (VII of 1956) so as to avoid a serious financial situation for the States affected by the situation. As part of a programme of clarification and reinforcement of the constitutional position arising from the *Bengal Immunity decision*[1] the *Constitution Sixth Amendment Act*, 1956, was passed which put (*a*) Entry 92-A in List I. Taxes on the sale or purchase of goods other than neswpapers, where such sale or purchase takes place in the course of inter-State trade or commerce—in the place of Entry 54, in List II the Entry—Tax on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I, Article 269 was added to by the new sub-clause (*g*) of clause (1) and clause (3) after clause (2) and lastly Article 286 was put into the form in which it now stands. It was as a result of the Constitution Sixth Amendment Act that the Union Parliament passed the Central Sales Tax Act (LXXIV of 1956) the preamble of which gives its dominant purpose. This is an Act to formulate the principles for determining when a sale or purchase of goods takes place in the course of inter-State commerce or trade or outside a State or in the course of import into or export from India, to provide for the levy, collection and distribution of taxes on the sales of goods in the course of inter-State trade or commerce and to declare certain goods to be of special importance in inter-State trade or commerce and specify the restrictions and conditions which State Laws imposing taxes on the sale or purchase of such goods of special importance shall be subject. This Act has clarified the position of the power of the State to levy tax on sales or purchases in inter-State trade or outside the State. The apportionment in an equitable way of the proceeds of inter-State sales and purchases tax has also been provided for and multiple taxation has been eliminated.

THE INDIVIDUAL *v.* THE STATE.

In a discussion on State Barrier the rights of individuals as against the State may not generally be considered relevant. Under the Indian Constitutional system however, the Fundamental Rights that are guaranteed to the individuals as against the State, State meaning the executive and legislative processes at all levels according to Article 12, are conceived in the back ground of the unity of the country as a whole. That is why State barriers against individuals are sought to be set aside to the extent indicated in Part III of the Constitution and that is why elsewhere I

1. 1955 S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168. A.I.R. 1953 S.C. 252.
2. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743.
3. (1957) 2 M.L.J. 167.

said the Fundamental Rights are limitations on the executive and legislative processes at all levels. It is no doubt true that the Fundamental Rights under Article 15 dealing with prohibition of discrimination on grounds only of religion, race, caste, sex or place of birth, Article 16 dealing with equality of opportunity in matters of public employment, Article 19 dealing with the seven freedoms therein mentioned, Article 29 dealing with the educational rights are guaranteed only in favour of the citizens of India to the exclusion of others. And in fact these Fundamental Rights may be designated the citizens' Fundamental Rights. When it is seen that it is a single citizenship that is accepted by the Indian Constitution as on the commmencement of the Constitution and by the Citizenship Act (LVII of 1955) subsequent to the commencement of the Constitution, the importance of the Fundamental Rights that are guaranteed to the citizens becomes at once clear. An Indian citizen is a citizen of the Indian Union and he is not only so treated, but assured by these articles that he can be in full possession and enjoyment of the rights in the manner guaranteed wherever he may be. The other articles of the Fundamental Rights Chapter avail any person, citizen and non-citizen alike. Under Article 14 any person is entitled to equality before the law or equal protection of the laws, under Article 20, protection in respect of conviction for offences, under Article 21 protection in respect of life and personal liberty, and under Article 22 protection against arrest and detention in certain cases are available to any person. The freedom of conscience and free profession, practice and propagation of religion under Article 25 is a guarantee in favour of all persons. Under Article 30 religious and linguistic minorities have the right to establish and administer educational institutions of their choice and it is held that the State shall not in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the management of a minority whether based on religion or language. Article 31 guarantees the right to property to any person in the manner indicated therein. I submit that the protection given to individuals in the Fundamental Rights Chapter cannot be interfered with by any executive or legislative action of whatever level except to the extent indicated in the provisions themsleves.

LINGUISTIC BARRIERS.

The political unity of India as a whole was realised for the first time during the British Rule and the bond of this unity was forged in the English language. Since then English has remained a convenient vehicle of expression for the administration of the country. It is also spoken by the Anglo-Indian minority of Indian Citizens who is under Article 30 like any other linguistic minority given a gurantee of its rights to establish and administer educational institutions of its choice ; it is also the behest of the same Article that the State shall not in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority based on language. In this sense the English language cannot be treated as an alien language in just the same way any other linguistic minority cannot treat the language of another linguistic minority as an alien language. This is how the Constitution looks at the languages of India

As against the fourteen regional languages in the VIII Schedule of which Hindi also is one, the English language with its advantage of spread fills a neutral character —that is—the love or hatred that each of these Regional Languages may have towards English is also likely to be more or less the same. But the resentment that may be produced in the event of one of these Regional languages being made the only official language of the Union as and from the year, 1965 is bound to be productive of forces that may imperil the country's unity, that is the sole aim of the Constitution—when it is seen that there is as a fact resistance to the imposition of Hindi on non-Hindi States. If a solution cannot be found for the Union official language issue, the only choice left is to continue English as the official language of India even after the year, 1965. The declaration of Article 343, clause (1) that the official language of the Union shall be Hindi in the Devanagiri script need not come in the way of the existing arrangement being continued, if the enabling provision is

taken advantage of by the Parliament passing a law continuing English as the official language of the Union after the date line also. With English as the official language of the Union, the problem of linguistic barriers that may arise as a result of the States reorganisation on linguistic basis may not become serious.

CONCLUSION.

The State barrier accepted by the Indian Constitution may not become complicated or controversial so long as a single political party remains in power in the Union and the States directing the executive and the legislative policies. If, however, rival political parties get into power at the Union and the States, in the implementation of the policies and programmes serious barrier problems may have to be faced and solved. But such solution may be possible if only the political parties of whatever kind feel bound by the behests of the Constitution—as otherwise the existence of the Constitution itself may be imperilled—in other words national character must assert itself. Even as it is, the problem of State barriers under the Indian Constitution is a peace time problem. If an emergency arises whether by war or external aggression or internal disturbance whereby the security of India is threatened and a proclamation making a declaration to that effect is issued by the President under Article 352 (1), during the currency of such a Proclamation of Emergency, the Veneer of federalism accepted by the Indian Constitution disappears and the country becomes at once unitary. In such circumstances there can be no problem of State barriers from any point of view.

RETIREMENT OF HON'BLE Mr. JUSTICE P. N. RAMASWAMI.

On the 7th May, 1960, the Fourth Court Hall of the Madras High Court was filled to capacity by members of the Bar. It was the occasion of the farewell address by the Advocate-General Sri V. K. Tiruvenkatachari to Mr. Justice P. N. Ramaswami who is retiring by the middle of this month, after a service of nine years as Judge of the Madras High Court.

Born on 17th May, 1900, in the village of Pazhamaneri in Tanjore District Sri P. N. Ramaswami had a briliant scholastic career and passed first in the Presidency in Economic Honours winning the Norton Prize of the Madras University. After postgraduate study in Cambridge University he fulfilled the bright expectations of him by coming out successful in the Indian Civil Service Examination in England. He was in revenue service for the first five years when he opted for judicial service and had his training under Mr. Burn, I.C.S., who later on became a judge of the Madras High Court. As District and Sessions Judge for nearly two decades he has served in many of the important districts in the then composite Madras State. During this period he also acted as the Chief Judge of the States of Banganapalle and Sandur and was for some time Additional Judge of the Court of the Resident of Hyderabad. In 1951 he was appointed as a permanent judge of the Madras High Court.

On the eve of his retirement His Lordship can look back with satisfaction on a term of full and varied work as judicial officer. As a judge of the High Court His Lordship has handled all types of work, both civil and criminal, and has presided over the Original Side, Appellate Side and Sessions. The judgments of His Lordship bear the imprint of his exhaustive study. While deciding cases between party and party, as ought to be, His Lordship felt that decisions of the highest Court in the State should serve a wider purpose, namely to guide and instruct the subordinate judiciary and the executive. With that object in view he spared no pains in reviewing and analysing the precedents whenever occasion warranted and quoted from standard treatises, commentaries and compilations in extenso to be of special use to the Courts and members of the Bar in the mofussil, who have very little facilities of access to such books and reports. Several of his judgments are a source of study in themselves on specific topics. In dealing with the cases before him, His Lordship brought to bear an impersonal and objective enthusiasm in laying down the law and correcting and streamlining the administration. His observations in judgments in civil matters are a commentary on the society and its ways and his remarks in criminal cases, which had a special attraction to him, are instructive to the investigator, prosecutor and the defence. Though methodical in the discharge of his duties His Lordship has always been kind and considerate to the Bar, especially to hard-working juniors. Impartial and balanced he has not been known to have developed any 'isms' towards any section of the Bar, and has always been of a helping disposition.

With his avidity for knowledge and his vast interest in books it was but natural that the Library of the High Court claimed his interest and attention. He threw himself heart and soul in improving and enriching it and can feel proud of having made it one of the best and most useful law libraries in the country. Besides contributing learned articles to Law Journals on topics of importance and interest His Lordship has written an encyclopaedic work, the "Magisterial and Police Guide". This book written early in his career has proved very useful to the Judiciary and Police, and has gone into two editions. His Lordship has been in charge of the revision of the High Court departmental publications like "Civil Rules of Practice", "Criminal Rules of Practice" and the "Manual for Special Magistrates."

On this occasion it will not be out of place to refer to the other public activities of His Lordship and his services to various institutions. He has been connected with the Indian Officers' Association, Madras, for over three decades and is its President for the past three years. He is the Chairman of the Madras Literary Society with

which also his association has been intimate and long. He is the Vice-President of the Homeopathic Association in Madras and is on the Governing Council of several educational and recreational institutions in the city and in the mofussil. He has been a visitor to the Senior Certified School in Chingleput, and has taken an active interest in the working of the Discharged Prisoners Society.

On the eve of His Lordship's retirement from service we wish to record our sincere and deep debt of gratitude for the valuable help and guidance we have received from him these years. Our sincere prayers to Lord Almighty to bless His Lordship with long life and good health. Active and energetic as he is we are sure he will continue his useful services in the cause of the country.

Farewell Address by the Advocate-General, Madeas, Sri V. K. Thiruvenkatachari.

The Advocate-General, Madras, Sri V. K. Thiruvenkatachari, bade farewell to his Lordship on behalf of the Bar on the afternoon of the 7th May, 1960, before a large gathering of the members of the Bar. The function was attended by the Registrar and other Officers of the High Court. The Advocate-General referred to the successful culmination of his Lordship's career of over thirty-six years and the industry, enthusiasm and interest evinced by his Lordship in the discharge of his work. "During these nine years of your Judgeship" he said " you have dealt with all types of work. You have been indefatigably industrious and have, on numerous occasions, pronounced compendious judgments, reviewing the entire law on the question on hand. You have always evinced a keen interest in the development of the law and contributed articles to legal journals. During your term of office you have performed your task with enthusiasm, a not common fervour,and an interest in law in all its aspects, and can in retrospect look back with satisfaction on work well done ". He wished his Lordship all good things and a happy retired life in the years to come.

The Hon'ble Mr. Justice P. N. Ramaswami's reply.

Thanking the Advocate-General and the Bar for the kind words and fine sentiments expressed on the occasion, his Lordship expressed his gratitude to the Chief Justice Hon'ble Sri P. V. Rajamannar, who had been kind and considerate to him throughout, and to his brother Judges who had been very co-operative and helpful to him during his tenure of office. He praised the Bar for its hard and efficient work and felt that despite the cry in recent years about the deterioration in the standards, the junior members of the Bar were as good, and with proper opportunities provided, they could come up to the heights of the earlier generation. He complimented the subordinate judiciary and the magistracy for their high calibre and ability and paid tribute to the staff of the High Court, especially the Bench-clerks and Short-hand writers.

Visit to the Advocates' Association.

On the last working day of the High Court before it closed for the summer vacation his Lordship visited the Advocate's Association during the lunch interval and was received and garlanded by the President of the Association, Sri T. M. Krishnaswami Iyer, who wished him good health and long life. A large gathering of members of the Bar greeted his Lordship who warmly shook hands with every one present and reciprocated the good wishes expressed by them.

Farewell Dinner by the members of the Bar.

Mr. Justice P. N. Ramaswami and Mrs. P. N. Ramaswami were the guests of honour at a specially arranged dinner by the members of the Madras Bar at the Woodlands, Mylapore, on the 9th May. Among the guests present were the Chief Justice, Judges of the High Court, past and present, and Presiding Officers of quasi-judicial Tribunals. It was announced on this occasion that a portrait of Mr. Justice P. N. Ramaswami would adorn the Library chamber of the Madras High Court, which was a place of special interest to him.

SRI K. P. LAKSHMANA RAO.

Retired Judge of the Madras High Court.

We deeply regret to record the death, at the age of seventy-three, of Sri K. P. Lakshmana Rao, at his residence in Gandhinagar, on 4th June, 1960. After a brief spell as a lecturer in the Madras Law College he was appointed as a District Judge and after a short period he was elevated to the Bench of the Madras High Court. He was on the Bench for 14 years and gave universal satisfaction to the Bar, to the litigants and to the general public. In his work he was painstaking to a degree and the thoroughness with which he fitted himself to the task of disposal of cases was of immense advantage to both the counsel and the client. His affability of manners sprang from an innate kindliness and courtesy and the tributes that were paid to him on the eve of his retirement from the Bench were by no means conventional. The Government availed themselves of his services in various capacities even after his retirement.

He was an all round sportsman of the first order and in his college days he was a noted athlete. In hockey he was one of the greatest centre-half the game has ever seen and the many trophies that he won at tennis bear witness to his proficiency in that game. He was also a good cricketer and as a billiards player he was much above the average.

Tall and commanding in personality he was for many years a familiar and well-liked figure not only in the playgrounds but also in clubs and other social surroundings. He was president of a number of clubs and associations and took a prominent part in their activities.

He lived a full life and the many hundreds of survivors of his generation will lament the passing away of a good, honest and able son of India.

MADRAS PROHIBITION ACT (X OF 1937) (AS AMENDED BY ACT VIII OF 1958).

Amendment Urged

By

V. SANKARAN, B.A., LL.B. *Asst. Public Prosecutor II, Karaikudi.*

Section 4 (1) of the Madras Prohibition Act enumerates the various types of offences contemplated under the Prohibition Act in the sub-sections (*a*) to (*k*) and prescribes the punishment in the succeeding sub-sections (i) and (ii). Section 4 (2) proceeds to lay down a mandatory rule of appreciation of evidence. I propose to point out the incompatibility of this sub-section regarding its application. Sub-section (2) of section 4 reads; "It shall be presumed until the contrary is shown (*a*) that a person accused of any offence under clauses (*a*) to (*j*) of sub-section (1) had committed such offence in respect of any liquor or intoxicating drug or any still, utensils, implement or apparatus whatsoever for the tapping of toddy or the manufacture of liquor or any intoxicating drug or any such materials as are ordinarily used in the tapping of toddy or the manufacture of liquor or any intoxicating drug (or any materials which have undergone any process towards the manufacture of liquor or any intoxicating drug or from which any liquor or intoxicating drug has been manufactured.) For the possession of which he is unable to account satisfactorily.... " As the section reads, the presumption contemplated operates regarding all the sub-sections (*a*) to (*j*). There is no substantial alteration in this sub-section by virtue of the amendment in 1958 excepting the addition pointed within brackets. The validity of the operation of this presumptive section becomes questionable regarding section 4 (1) (*j*) in this aspect. Section 4 (1) (*j*) reads :

" Whoever........(*j*) consumes or buys liquor or any intoxicating drug ; or......shall be punishable ", etc.

As regards buying liquor or intoxicating drug , normally it will be attended to by a recovery of the contraband. Then the presumptive force of section 4 (2) could be applied. But as regards consumption the only evidence available would be the smelling of alcoholic breath and other physiological symptoms pertaining to eyes, gait, pulse, etc. Here no recovery is likely to arise. Dealing further with the other offences set out in section 4 (*a*) to 4 (*i*) the detection will always be accompanied by recovery and seizure list. Only in section 4 (1) (*j*) the contingency will arise where there could be no recovery.

Firstly, the entire section 4 (2) (*a*) is an introduction of a novel provision hitherto unknown in Indian Evidence Act. Similar nature of presumption of the things out of objects possessed has been discussed in section 114 (*a*), Indian Evidence Act, which reads ;

" The Court may presume (*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

The legislature has then thought wise to use the phrase "may presume ", but in the Madras Prohibition Act the phrase "shall presume" is used under exactly similar circumstances flowing from possession. The additional lacuna in section 4 (1) (*j*) is that the presumption is made applicable even to a case where no possession of any contraband is spoken to.

It is worthwhile to note that this presumptive section does not operate to section 4-A which reads "whoever is found in a state of intoxication......shall be punished."

No nature of any presumption will work against a person found intoxicated but the Court shall presume the offence accused as against the person who consumes. The High Courts have held that intoxication is drunkenness or excessive use of intoxicating drugs and a more severe offence than consumption. This only makes the discriminatory spirit of the enactment more difficult to support. Nor does any stress seem to have been so far laid in the present tense of the word "consumes" and argued any time that the consumption must actually be witnessed by somebody. Rather

instances of consumption subsequently detected have been punished and confirmed by the Madras High Court. But this aspect of presumption has been subjected to discussion in The *Public Prosecutor* v. *Chaniappa Pujary*[1].

There his Lordship Justice Somasundaram has observed after an elaborate discussion that "the presumption will apply to a portion of section 4 (1) (*j*) but not to the whole of it. The presumption will apply to that portion which deals with buying liquor or any intoxicating drug where possession can be proved." But the spirit of that judgment was not taken note of during the recent amendment of 1958. So it is necessary to amend the Madras Prohibition Act and adopt "may presume" instead of "shall presume" in section 4 (2), and provide that this presumption shall not operate against the person charged for mere consumption under section 4 (1) (*j*) if unaccompanied by any recovery. The presumption can be involved only when the accused is caught redhanded when consuming the contraband, in which case either there will be an additional charge for possession of liquor under section 4 (1) (*a*) or at least there will be a recovery of the bottle or vessel with which the accused consumed, as this stands on the same footing with other offences vouched by a proper seizure and search list.

Another glaring inconsistency in the statute is this.

The punishment for an offence of consumption under section 4 (1) (*j*) as set out in section 4 (1) (ii) of the Act is "imprisonment for a term which may extend to one year and with fine which may extend to two thousand rupees, but in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and such fine shall not be less than five hundred rupees." For the offence of intoxication under section 4-A the punishment is only "imprisonment which may extend to six months, or with fine which may extend to one thousand rupees or with both". The noteworthy point is intoxication is excessive conusmption. Excessive consumption, *viz*., intoxication is punished lighter, whereas mere consumption under section 4 (1) (*j*) is punished with a highly deterrent sentence. This aspect has been touched by their Lordships Somasundaram and Ramaswami Gounder, JJ., in *Palani Goundan* alias *Thambianna Goundan* v. *State*[2]. The relevant observation runs :

"......It is somewhat surprising that it has not taken care to define what intoxication means. In the absence of any statutory definition, we will have to adopt its ordinary etymological meaning, namely a condition produced by excessive use of alcoholic stimulants, as defined in Dorland's American Medical Dictionary....the offence under section 4-A appears to be an aggravated form of the offence under section 4 (1) (*j*)". So it would be rather reasonable to punish the offence under section 4-A more deterrently than the offence under section 4 (1) (*j*). But the provision prevailing in the statute is exactly the other way round. Hence, it is highly essential to carry out proper amendment in the penal provisions. It will be desirable to incorporate a definition for "intoxication" in the Act as expressed by their Lordships.

1. (1951) 1 M.L.J. 94.

2. (1956) 2 M.L.J. 273.

BOOK REVIEWS.

BOWSTEAD ON AGENCY, 12th edition (1959) by E.J. Griew, M.A., LL.B., Barrister-at-law. Published by Messrs. Sweet and Maxwell, London. Agents in India, Messrs. N. M. TRIPATHI (PRIVATE) LTD., Bombay.

It will be really superfluous to attempt to introduce this familiar work to the legal public. Since its first appearance nearly sixty years ago Bowstead on Agency has become a byword in the legal profession. Though the Law of Agency is a part of the Law of Contracts still the contract of agency has certain special features. While the general law of contract, deals with the rights and obligations of the parties to the contract the Law of Agency is peculiar as the rights of third parties also come into play in addition to rights and liabilities existing between the Agent and Principal. Hence any special work on Agency has always been resorted to when problems arise between the Principal and Agent on the one hand and their liability to the third parties. The law though codified to some extent is still to be found in the principles laid down in the decisions of the Chancery Courts. The present edition of this excellent book brings up the work to March, 1959. The propositions are stated, exemplified and explained with the aid of illustrations and case-law. The printing and get-up of the book leaves nothing to be desired and we are sure this handy volume will prove as useful and popular as its predecessors. The references to the latest American Law on the subject is bound to be of immense use to the Legal Practitioners in this country who resort to American decisions more and more in recent years.

LECTURES ON CODE OF CRIMINAL PROCEDURE BY A. K. PAVITRAN, B.A.B.L., Bar-at-Law, 1960. Price Rs. 8.

The Code of Criminal Procedure is probably one of the most voluminous of the Codes on the Indian Statute Book and even a practising lawyer sometimes gets lost in the maze of its provisions. To students of law the several hundreds of its sections and the Schedule could never give a comprehensive idea of the scheme and provisions of the Code. A hand-book of the type under review which gives a summary of its provisions in the form of lectures divided into convenient chapters under suitable headings is certainly a welcome one.

The book contains 17 chapters covering about 400 pages and gives an analytical summary of the Code of Criminal Procedure under suitable headings such as prevention of offences, power of police to investigate, trial of cases, mode of taking and recording evidence, reference and revision and so on. The language of the section is taken to explain each of the points with reference to the case-law. The book does not purport to be an exhaustive treatise on the Code and is not intended to compete with the more exhaustive reference works on the subject. As the Author himself modestly puts it in his preface the book is intended mainly for students and for Police Officers and Magistrates as a quick and handy reference book. The book, however, would have been more useful if the Author had reprinted the text of the Code separately either at the beginning or at the end of the book.

The book needs no greater recommendation than the appreciative Foreword it has received from the Hon. Sri. P. V. Rajamannar, Chief Justice of Madras.

The HANDBOOK OF CRIMINAL LAW by S. Krishnamurthi, Bar-at-Law. Published by V. S. N. CHARI AND COMPANY, Nungambakkam, Madras. 9th edition, 1960. Price Rs. 16.

This popular hand-book which has been used by the profession for nearly two decades now needs no introduction. The book maintains its useful standard and utility and incorporates all the recent amendments to Criminal Procedure Code, Evidence Act and Criminal Rules of Practice with special reference to Madras and Andhra. We are sure that this edition would prove as popular as the previous ones.

LAW OF ADMISSIONS AND CONFESSIONS by Y.H. Rao and Y.R. Rao, 2nd edition, revised by Y. R. Rao, Advocate, Andhra Pradesh High Court. 1960. Price Rs. 22-50.

We had occasion to review the first edition of this publication which appeared in 1951. This is one of the series of publications which the Authors have taken up in dealing with certain special aspects of the Law of Evidence with reference to administration of Criminal Justice. That a second edition of the book has been called for shows the popularity and success of the scheme envisaged by the Authors. This edition keeps up the original format and treatment of the subject as in the first edition. The law relating to Admissions and Confessions has been expanded and dealt with *in extenso* with reference to the several sections of the Indian Evidence Act and the Code of Criminal Procedure and the case-law.

Though admissions and confessions relate to the same species, admission has a wider concept than confession. While confession is restricted only to criminal matters admissions relate to civil matters also and to oral as well as documentary admissions. The book under review relates only to Criminal trials. The subject is divided into several chapters under suitable headings such as voluntary confessions and confessions to Police Officers, confession of a co-accused and so on. Under each topical discussion the case-law of the several High Courts and the Supreme Court are discussed *in extenso*. Whatever might have been the justification for the treatment of the case-law according to High Courts in the earlier edition such a division of cases in the present set-up is an anachronism. The decisions of all the High Courts have equal weight or authority. Most of the divisions such as Cutch, Pepsu, etc., are no longer current and a separate treatment of cases reported in Lahore, Sind, Oudh, Rangoon, etc., series is longer necessary. An index would have certainly added to the utility of the book. We are sure that the present edition would be well received by the Bench and the Bar.

BOMBAY RENT ACT, by J. H. Dalal, B.A., LL.B., with a Foreword by the Honble Mr. Justice J. C. Shah, High Court of Bombay, Published by Messrs. N.M. TRIPATHI (PRIVATE) LTD., Bombay, 3rd edition, 1960. Price Rs. 16.

The Rent Control Legislation in India which was necessitated by the exigencies of the last War has been continuing in some form or other all these years. Almost all the States in this country have adopted some kind of control over rents of premises and given protection against unreasonable eviction of occupiers of same. In recent years there has been a cry from certain quarters that rent control has over-stayed its usefulness and ought to be completely lifted. Equally another section has been demanding for a more stringent and comprehensive legislation in this regard. Whatever may be the merits of either view it cannot be denied that so long as there is shortage in urban housing and so long as there is a possibility of rack-renting it is the duty of the State to protect the society from forces that would otherwise unduly disturb its peaceful and orderly existence.

The book under review is the third edition being a commentary on the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947. That the book

has gone through its third edition within the course of these ten years is proof positive of its utility. The book is an exhaustive and analytical commentary and on a statute which has given room for a good volume of litigation. Special Tribunals appointed under the Act as well as the Courts have been dealing with a number of cases. The Author of the book has taken pains to collect not only the reported cases but also unreported decisions of the Tribunals as well as the High Court of Bombay under the Act. The discussion of case law and the principles are both elaborate and exhaustive and we are sure that legal practitioners, landlords and tenants and the Courts would find the book very useful.

PRINCIPLES OF EQUITY by Trikamlal R. Desai, B.A., LL.B., Vakil, High Court, Bombay, 8th edition, 1959. Price Rs. 10. Published by Messrs. S. C. SARKAR AND SONS (PRIVATE) LTD., 1-C, College Square, Calcutta-12.

This small hand-book on the Law of Equity has been very popular with students of law for over a generation. The Principles of Equity Jurisprudence applicable to India are mostly based on the law as developed in English Courts. Certain Statutes like the Indian Trusts Act and Specific Relief Act incorporate some of these equitable principles and remedies in the form of statutory provisions. But interpreting these statutory provisions Courts of Law in this country resort only to the decisions of the English Courts on the subject.

This handy publication which has run through eight editions has been found useful by a large number of students and a section of the practising lawyers also. The basic concept of Equity Jurisprudence is explained with special reference to trusts and specific relief. The subject-matter is dealt with in a lucid fashion in a small compass and will be found useful both by students of law and lawyers.

INTRODUCTION TO THE CONSTITUTION OF INDIA By Durga Das Basu. Published by S. C. SARKAR AND SONS (PRIVATE) LTD., 1-C, College Square, Calcutta-12 (1960). Price Rs. 10.

The Author of this book is already known by his premier publications of the Commentary on the Constitution of India and the Shorter Constitution of India. Those books intended for the practising lawyer and students of law are naturally beyond the understanding of laymen. The present book is a summary of the provisions of the Constitution and is an attempt to explain the principles without encumbering the same with case-law or statute. At the end of each Chapter a list of references are included which could be resorted to for a further study on the subject. The present book is a welcome addition to the Author's previous works on the Constitution and would do the much-needed task of educating the laymen about the provisions of the Constitution of our country.

[END OF VOLUME (1960) 1 M.L.J. (JOURNAL).]